141-415

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 318. ~~37~~ 10

SAMUEL G. HICKMAN, PLAINTIFF IN ERROR,

vs.

THE CITY OF FORT SCOTT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED APRIL 21, 1887.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Order allowing petition to amend record to be filed	1	1
Petition to amend record	2	1
Mandate of Supreme Court U. S.	17	9
Motion for judgment on mandate	20	11
Judgment	21	11
Opinion	24	13
Order overruling motion to amend record	29	16
Bond on writ of error	30	16
Clerk's certificate	32	17
Writ of error	33	17
Citation (original)	34	18
Copy of citation and acknowledgment of service	35	18
Writ of certiorari and return	37	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 11, 1890.

1 UNITED STATES OF AMERICA, *District of Kansas*, } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 24th day of November, A. D. 1884, proceedings were had and appear of record in words and figures following, to wit:

SAMUEL G. HICKMAN *vs.* THE CITY OF FORT SCOTT. } 3139.

TUESDAY, *February* 3, 1885.

Now comes the plaintiff, by Rossington & Smith, his attorneys, and presents to the court his petition to amend the record herein. On consideration whereof it is ordered by the court that he be and is now allowed to file the same; which he now does.

2 Circuit Court of the United States for the District of Kansas.

SAMUEL G. HICKMAN *vs.* THE CITY OF FORT SCOTT. } No. 3139.

The petition of Samuel G. Hickman, the above-named plaintiff, respectfully showeth as follows:

On November 3rd, 1884, the opinion of the Supreme Court was delivered, whereby it was directed that the judgment of this court should be reversed and the case remanded to this court, with the directions fully set forth in said mandate. Under the circumstances of the case as hereinafter expressed the plaintiff is advised that the cause is one in which this court may with propriety grant a new trial on account of gross and vital errors in the findings of facts, and also amend the record by allowing certain findings of facts to appear, some of which findings were unavoidably and others accidentally omitted.

It is not intended to question the general propositions of law as announced in the decision of the Supreme Court in this case, as any such criticism would now be idle and improper.. It is desired only that the record should be so amended as to state as well as import the truth, and that the plaintiff should have an opportunity of having the actual facts of the controversy taken into consideration by this court and, if necessary, by the Supreme Court before the matter finally passes *in rem judicatam.* The decision of the Supreme Court was based upon an imperfect and erroneous report of the cause, and
3 all that the plaintiff now desires to do is to have the record placed in such shape that the truth may be judicially ascertained before final judgment against him.

The granting of this application can do no possible injury to the defendant. If under the findings of all the facts as they shall eventually appear of record the decision of the Supreme Court shall be in its favor it will have suffered no harm. No funds are tied up. No injunction is pending. No change will be made by granting this petition to the detriment of the defendant in any possible respect. If, on the other hand, the correction of the record herein prayed for shall result in a judgment in favor of the plaintiff, then it will only be because upon the whole truth of the case the plaintiff will be considered as entitled to recover, and the enforcement of a just claim against the defendant cannot be regarded in law as an injury of which he can complain.

The reason why some grave errors crept into the findings of fact and why certain most material facts were omitted from the record, and the grounds upon which it is now asked that those errors be corrected and those omissions be supplied, are as follows:

The cause was tried at November term, 1883, of the circuit court for this district, before Circuit Judge McCrary and District Judge Foster, and at the closing argument Judge McCrary stopped the counsel for the plaintiff and announced that the court found for the plaintiff. When asked by counsel if he so found upon any specific facts, his honor stated that he found for the plaintiff upon all the facts and circumstances in the case, and further stated in that connection in substance that the spreading of the circular of September 3, 1878, addressed to the bondholders on the records of the defendant corporation, was a sufficient notice to all the world.

4 Very soon after Judge McCrary was taken ill and was obliged to leave for his home before the findings could be prepared and submitted to the court. The matter, therefore, came up before the district judge alone, and for several days at intervals there was constant difference of opinion between the opposing counsel as to what the findings should be, each insisting on certain findings in his favor which he claimed were warranted by the evidence. The result was that the judge became weary of the controversy and signed the findings, as shown by the record taken to the Supreme Court, adopting generally those prepared by the counsel for the city. The counsel for the plaintiff considered the findings which subsequently appeared in the record prepared for the Supreme Court sufficient, if Judge McCrary's opinion as to the conclusiveness of the entry of record of the circular of September 3, 1878, was sustained, and he doubtless took it for granted that if that was reversed an opportunity would be afforded in this court to prove such other facts or to correct the findings in accordance with the facts already proven.

He was not, therefore, as strenuous and importunate as he might otherwise have been in supervising such findings and including all matters in the record favorable to the plaintiff. His action in this respect, as your petitioner is informed and believes, was due to the fact that although the circuit judge stated at the conclusion of the argument, as already mentioned, that he found for the plaintiff on all the facts and circumstances of the case, he laid special stress on the circular already mentioned appearing upon the record of the corporation defendant as in itself sufficient.

Moreover, the omission of some of the findings of fact is,
5 under the circumstances of the case, further to be accounted for by the voluminous character of the record. The records and files in the cause aggregate about one thousand pages, and in view of the illness and subsequent absence of the presiding judge, of the pressure under which the findings of fact were prepared, and of the disagreements between counsel as to very many of them, it is not surprising that many matters contained in this voluminous record were accidentally overlooked or mistakenly stated.

Then, too, a most grave and serious injury was suffered by the plaintiff by the confusion of Henry B. Buckwalter, Junior, with Henry Buckwalter, Senior.

The deposition of the former was construed to establish certain conclusions of fact which were only in the knowledge of Henry Buckwalter, Senior, whose testimony would conclusively establish the mistake under which the Supreme Court was laboring as to most important and pivotal facts relating to actual sending to and receipt by holders of the Macadam bonds of the circular in question.

If the ground chosen by the circuit judge as the basis of his decision had not rendered any other basis unnecessary the counsel for the plaintiff could and doubtless would have furnished the testimony of Henry Buckwalter, Sr., to prove beyond question the facts within his knowledge, as hereinafter stated.

Such being the reasons accounting for the omission of certain material findings and the mistake as to others, the petitioner lays before the court the following statement of such findings of actual and undoubted facts as he is advised are material and which
6 do not appear in the record as it was presented to the Supreme Court, and which, if allowed an opportunity so to do, he will be able to establish beyond any doubt whatever.

1. Henry Buckwalter, Senior, of West Chester, Pennsylvania, was the owner and holder of special improvement or Macadam bonds, and did not own or hold bonds of the city of Fort Scott of any other class, and was the original owner and purchaser of all *of all* of said Macadam bonds owned in West Chester or the vicinity, and particularly was the original holder of the bonds in this suit.

This fact, in itself of very great importance, derives additional weight from the serious mistake which found its way into the finding of this court, and which is alluded to in the opinion of the Supreme Court as furnishing one of the most material grounds for its decision.

It is stated in the sixth finding that the city clerk sent a copy of the circular "to each of the holders of the bonds of said city, except to the holders of said special improvement or Macadam bonds, but did not send said circular to this plaintiff, nor to any agent or representative of his, nor to any other holder of said special improvement or Macadam bonds."

The seventh finding includes (*inter alia*) a statement that H. Buckwalter (therein called Burkhalter), being Henry B. Buckwalter, Junior, also "held some of the bonds of said city other than said special improvement or Macadam bonds." So far from these statements of fact in the findings being true, the facts were just the other way.

Henry Buckwalter, Senior, did not hold any bonds other
7 than the special improvement or Macadam bonds, but did
hold the said Macadam bonds, and as such holder received the circular issued by the city clerk under the resolution of city councils and exhibited the same after its receipt to the plaintiff. The circular therefore did not only in terms embrace the said bonds, but was sent to a holder of them.

2. One I. Cary Carver, of West Chester, Pennsylvania, was employed by one James H. Brown, the duly authorized agent of the city of Fort Scott, to attend to the calling in of certain outstanding ten per cent. school bonds and the delivery in their stead of certain six per cent. bonds. This was finally accomplished in the summer or autumn of 1879, but at what precise date the plaintiff is unable to state. Prior to this date, namely, in August, 1878, the said I. Cary Carver received a letter from C. F. Martin, treasurer of the school board of the city of Fort Scott, of which the following is a true story:

"Fort Scott, Kan., *August* 19*th*, 1878.

"I. Cary Carver, Esq., West Chester, Penna.

"Dear Sir: Yours the 8–15 duly received. There is no funds on hand to meet past-due interest, and I do not know when there will be any. Some of our citizens are talking of a compromise, as they consider the city and school indebtedness too large. The proper authorities are getting out a statement showing the condition of our city indebtedness. A copy will be sent to you, so you may see how the city stands and it will give you the desired information.

"Yours truly, C. F. MARTIN,
"*Treas. School Board.*"

8 In the month of September, 1878, the said Carver received
from the duly authorized agent of the city of Fort Scott a copy of the said circular, signed (in writing) S. S. Davis, city clerk, and dated September 3d, 1878, to be shown to all bondholders of the city of Fort Scott residing in the vicinity of West Chester, where the said Carver was in business, without distinction as to the character of the bonds held by them. The said Carver was at that time the receiving teller of the bank and had been in communication with the said bondholders, some of whom, including the plaintiff, had been accustomed to deposit their coupons with him, as such receiving teller, for collection. The circular thus received for that purpose by the said Carver was shown by him to the plaintiff, who was at or about the same time requested by the said Carver to give to him (Carver) the numbers of the Macadam bonds held by parties who resided in the vicinity of West Chester for the purpose of forwarding the list to the above-mentioned James H. Brown, the duly authorized agent of the city, who had requested him (Carver) to ob-

tain the information. Accordingly the plaintiff did set down on paper the numbers of certain bonds held by himself, together with the dates of issue, which paper was handed by the plaintiff to the said Carver and, as the plaintiff is informed and believes, duly transmitted by him to the said James H. Brown.

The number of bonds on the list thus furnished by the plaintiff correspond with the numbers, or a portion of them, contained in the letter from J. H. Randolph to Donnell, Lawson & Simpson, of New York, of August 6th, 1875, and with the numbers, or some of them, of the bonds upon which the present action was brought.

9 At this time, viz., when the circular was shown by the said Carver to the plaintiff, the latter was the owner of some of the school bonds as well as some of the Macadam bonds. His attention was called by the circular to the total of the indebtedness of the city of Fort Scott, and to the fact that the amount due on the Macadam bonds was treated as an existing debt for the purpose of estimating said total. In view of this total indebtedness and of the proportion which it bore to the assessed value of the city property, and also upon the ground of the express recognition of the Macadam bonds as a valid obligation, the plaintiff deemed it advisable to accept the terms of compromise of the school bonds.

The city of Fort Scott by thus holding out to the plaintiff the recognized existence of the Macadam bonds induced him to accept terms which otherwise he might and, to the best of his belief, would have declined.

3. James H. Brown was the duly authorized agent of the city of Fort Scott to attend on its behalf to the compromise of settlement of the Macadam bonds. In pursuance of his authority to that effect and being aware that the said Henry Buckwalter, Senior, then held certain of the said bonds, the said James H. Brown, on April 12th, 1879, wrote to the said Henry Buckwalter, Senior, a letter, of which the following is a true copy:

"Fort Scott, Kansas, *April 12th*, 1879.

"Mr. Henry Buckwalter.

Dear Sir: Will you inform me how many Fort Scott 10 Macadam bonds you hold and the whereabouts of all others issued by said city as Macadam bonds. There will be a new council in a few days, and it is proper that they should know what the city indebtedness is. You will also state when or at what date the last interest was paid to ——. The city owes about 40 cents on the dollar of the valuation of her property, and it will be necessary for her to compromise her indebtedness and to issue new bonds for the amount agreed upon as a compromise.

"Please answer immediately. We have to fight a spirit of repudiation here and we think it will be better for the holders of our Macadam bonds to take 50 cents on the dollar for principal and interest due now and have new bonds under the recent funding bill, that are certain to be paid promptly, than to take the chances on general bankruptcy and repudiation. We want to arrange our debt so the people will certainly pay what they agree to without failure.

"It is a fact that the Macadam debt was contracted by the few whose property joined or fronted on such special improvement, and that the large majority of the tax-payers had no voice, by vote or petition, in the contraction of the debt, and hence many oppose paying any part of it; but a portion of it, perhaps 50 cents on the dollars, will eventually be collected by the city off of the particular property assessed, and many of us hope, with proper concessions on the part of holders of the bonds and under the recent funding bill passed by our Legislature, to issue new bonds, and then the interest will be paid promptly if the amount so compromised is not so large as to be burdensome. Answer without delay.

"J. H. BROWN, *Co. Clerk.*"

11 4. In the month of May, 1879, the said James H. Brown, as such agent of the city of Fort Scott, and in further pursuance of his duties upon the subject of the Macadam bonds, procured a meeting to be held at the office of the said Henry Buckwalter, Senior, at West Chester, Pennsylvania, of all the Macadam bondholders residing in the vicinity. At this meeting the plaintiff and the said James H. Brown and the said Henry Buckwalter, Senior, and a number of other holders of the said Macadam bonds were present, and a proposition of compromise or settlement of the same was submitted by the said Brown, viz., fifty cents on the dollar of the principal and of the interest at ten per cent., which said Brown stated he was expressly authorized by the said city of Fort Scott to make, but which was declined; and subsequently, at the same meeting, sixty-five per cent. of said principal and of said interest, which last offer the said Brown said would probably be ratified by the said city, and which he left for the consideration of the bondholders.

The meeting was held at the office of the said Henry Buckwalter, Senior, because the bondholders in the vicinity, including the petitioner, had obtained their bonds through him, and all the correspondence with the authorities of the city of Fort Scott relative to the said bonds had been conducted through him up to that date. In this correspondence and in all communications to and from the city of Fort Scott the said Buckwalter was acting as the general agent of the plaintiff and the other bondholders in the vicinity, and reported to the plaintiff, as he received it, all information which he thus received.

Subsequently a letter was written by the said Brown from Philadelphia to the said Henry Buckwalter, Senior, dated May
12 24th, 1879, of which the following is a true copy:

Colonade Hotel, cor. Fifteenth and Chestnut streets, Philadelphia;
John Crump, proprietor.

"MAY 24TH, 1879.

"Mr. Henry Buckwalter.

"DEAR SIR: Lest there should be some misunderstanding in regard to my proposition in regard to Macadam bonds, I will write it as follows: Count the unpaid interest due to date at legal rate on overdue coupons since due and give your new bonds, running 30 years, drawing six per cent. interest, at the rate of 65 per cent. of the amount due at the date of exchange on bonds and coupons. This is the best possible offer I can make. The city to pay the costs already adjudged against her on said bonds in U. S. court. Let me hear from you by Wednesday, care Donnell, Lawson and Co., N. Y.

"Very respectfully,

"J. H. BROWN, *Ag't City.*"

Of the receipt of this letter the plaintiff and other holders of the Macadam bonds were duly informed.

5. The plaintiff, together with Marshall B. Hickman, who was at that time also a holder of certain of the said Fort Scott improvement or Macadam bonds, presented all of the bonds which they then held (including all the bonds in this suit) for payment to Messrs. Donnell, Lawson & Simpson, on September 8th, 1875, and demanded payment thereof. The plaintiff is advised and be-
13 lieves, and so avers, that the payment made through Don-
nell, Lawson & Simpson in September, 1875, was in fact, and can be shown to have been intended as, a payment on account of the indebtedness of the city of Fort Scott to the plaintiff on all the bonds held by him, and not simply as a payment of the balance due upon one bond. This will appear by (among other things) the entries made in the books of the treasurer of the city.

6. The mayor of the city of Fort Scott, in his inaugural address to the council of the city, by whom the circular letter was issued, admitted the existence of the debt represented by the special improvement or Macadam bonds, and recommended its adjustment. This address of the mayor was adopted by council, and by its order spread at large upon its records.

7. A special tax was levied and collected by the city authorities on account of the bonds in question and for the purpose of paying them, and was deposited as a special fund in the treasury of the city for that purpose.

Of the above facts some are most material, as amounting in themselves to an unquestionable acknowledgment of the debt; others, such as the levying and collection of a tax, are of great importance as indicating most persuasively the intention which existed in the minds of council when they directed the circulars to be issued.

Other facts and circumstances supporting the same view of the case were, it is believed, also proved before this court, but the absence of them from the findings is due to the circumstances already mentioned.

14 It is important that another circumstance should be
brought to the attention of the court. It was stated by the plaintiff in error, and assumed as a fact in the opinion of the Supreme Court, that the records of the city councils distinctly stated that the circular letter was not to be sent to the holders of the Macadam bonds.

The silence of the finance committee as to the holders of such bonds and the adoption of their report by the city councils apparently were treated as equivalent to an express direction that the indebtedness which those bonds represented should not be recognized, and that the circular letter should not be sent to the holders.

This, however, is a mistake; for if the finance committee meant by their silence to recommend negatively that the circular should not be sent to the Macadam bondholders, this recommendation evidently did not meet with the approval of the councils, because at the very meeting at which the report of the committee was submitted the following motion was made and carried:

"On motion, the city clerk was instructed to have one hundred copies printed of the circular, with the report of the finance committee on our indebtedness, as the city attorney may direct, to be sent to the holders of our city bonds."

It therefore appears that there was an express resolution directing the circular letter to be sent to the "holders of our city bonds" without any qualification. If the councils had intended to limit the sending of the circulars to the holders of any class of bonds, nothing could have been more easy than to have said so, particularly as they had before them the recommendation of the finance
committee to that effect, which provided that the notice "be
15 sent to each person holding the city and school district bonds
except Macadam bonds, about which latter we make no report." The omission of the words "except Macadam bonds" in the resolution of the city is, it is admitted, the strongest kind of evidence that the councils when they passed the resolution intended to include them in the general term "city bonds;" if they did not they would have said so. Therefore it is a mistake in fact to suppose that the record of the city councils stated distinctly that the circular letter was not to be sent to the holders of the Macadam bonds. On the contrary, the records of the city councils *is* just the other way.

Wherefore the plaintiff prays this honorable court that he may be allowed to make due proof of the actual facts relating to the sending to and receipt of said circular of September 3, 1878, by said Henry Buckwalter, Senior, then the owner in part of the very bonds now in suit, and of the other material allegations in the foregoing petition contained, and that the omissions and mistakes in the findings of fact hereinbefore stated be supplied and corrected, to the end that the record of said cause may be a true record before judgment is entered in pursuance of said mandate; or, if such judgment is first entered, then that such judgment may be opened and a new trial ordered.

SAM'L G. HICKMAN.
S. G. H.

STATE OF PENNSYLVANIA, } *ss:*
County of Chester, }

Samuel G. Hickman, being affirmed according to law, says that the facts stated in the foregoing petition are true as he verily believes.

16 SAM'L G. HICKMAN.

Affirmed and subscribed before me, a notary public in aforesaid county, Jan'y 22nd, 1885.

[SEAL.] A. RUPERT,
Notary Public.

Endorsed: No. 3139. Samuel G. Hickman *vs.* The City of Fort Scott. Petition for correction of bill of exception and amend record. Filed Feb. 2, 1885. A. S. Thomas, clerk.

17 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Kansas, Greeting:

Whereas lately, in the circuit court of the United States for the district of Kansas, before you or some of you, in a cause between Samuel G. Hickman, plaintiff, and The City of Fort Scott, Kansas, defendant, wherein the judgment of the said circuit court, entered in said cause on the 1st day of December, A. D. 1883, is in the following words, viz:

"The court finds, as matters of law, that the plaintiff is entitled to recover upon the bonds sued on in the amount of $26,385.23 and for judgment accordingly, the judgment to bear interest at ten per cent.

It is therefore now by the court here considered, ordered, and adjudged that said plaintiff, Samuel G. Hickman, have and recover of and from said defendant, The City of Fort Scott, the sum of twenty-six thousand three hundred and eighty-five dollars and twenty-three cents and his costs in this action expended, and that this judgment bear interest at the rate of ten per cent. per annum," as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-four, the said
18 cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed, with costs, and that the said defendant, The City of Fort Scott, Kansas, recover against the said plaintiff one hundred and eight dollars and thirty cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court with direction to enter a judgment for the plaintiff on bond No. 78 for $500, with proper interest thereon, less a credit on said bond of $290, of the date of November 8th, 1875; and as to the other bonds sued on to enter a judgment for the defendant, with costs.

3RD NOVEMBER, 1884.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the nineteenth day of February, in the year of our Lord one thousand eight hundred and eighty-five.

Costs of defendant:

Clerk	$45 30
Printing record	43 00
Attorney	20 00
	$108 30

Taxed by—

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

19 Endorsed: No. 3139. No. 846. October term, 1884. Mandate Supreme Court United States. The City of Fort Scott *vs.* Hickman. Filed Mar. 2, 1885. A. S. Thomas, clerk.

Supreme Court of the United States. October Term, 1884.

Costs of the City of Fort Scott in No. 846.

1884, Oct. Term.

Docketing cause and filing record	$5 00
Appearance	25
Filing precipe and receipts	75
Filing papers	2 25
Filing stipulation	50
Filing briefs	5 00
Submission	20
Judgment	1 00
Filing same	25
Recording proceedings	40
Mandate	5 00
Preparing record for printer, &c	24 30
Costs and copy	40
	$45 30

Fee Book Z, page 58.

Test: JAMES H. McKENNEY, *C. S. C. U. S.*

1885.—Received payment, per deposit by J. D. McCleverty, Esq.

JAMES H. McKENNEY,
Clerk Supreme Court U. S.

20 In the Circuit Court of the United States, District of Kansas.

SAMUEL G. HICKMAN, Pl'ff,
vs.
THE CITY OF FORT SCOTT, KANSAS, Def't.

Motion for Judgment on Mandate.

Now comes the said defendant, by J. D. McCleverty, its attorney, and moves the court to spread upon the records of this court the mandate of the Supreme Court herein and for judgment in accordance therewith.

J. D. McCLEVERTY,
Def't's Att'y.

Endorsed: No. 3139. Samuel G. Hickman *vs.* The City of Fort Scott, Kansas. Motion for judg't on mandate. Filed Mar. 2, 1885. A. S. Thomas, clerk. J. D. McCleverty, def't's att'y.

21 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 24th day of November, A. D. 1884, proceedings were had and appear of record in words and figures following, to wit:

MONDAY, *March* 2, 1885.

SAMUEL G. HICKMAN, Pl'ff,
vs.
THE CITY OF FORT SCOTT, in the State of Kansas, Def't } 3139.

Now, at this day, this cause came on for hearing upon the motion of the defendant to spread upon the records of this court the mandate of the — court of the United States *court*, now on file herein, and, said mandate being presented to the court, it is therefore now here ordered that said mandate be, and it is hereby, spread upon the record in this court, and is in the words and figures as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Kansas, Greeting:

Whereas lately, in the circuit court of the United States for the district of Kansas, before you or some of you, in a cause between

Samuel G. Hickman, plaintiff, and The City of Fort Scott, Kansas, defendant, wherein the judgment of the said circuit court, entered in said cause on the 1st day of December, A. D. 1883, is in the following words, viz:

"The court finds as matters of law that the plaintiff is entitled to recover upon the bonds sued on in the amount of $26,385.23, and for judgment accordingly, the judgment to bear interest at ten per cent.

22 It is therefore now by the court here considered, ordered, and adjudged that said plaintiff, Samuel G. Hickman, have and recover of and from said defendant, The City of Fort Scott, the sum of twenty-six thousand three hundred and eighty-five dollars and twenty-three cents and his costs in this action expended, and that this judgment bear interest at the rate of ten per cent. per annum," as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears; and whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-four, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed with costs, and that the said defendant, The City of Fort Scott, Kansas, recover against the said plaintiff one hundred and eighty dollars and thirty cents for its costs herein expended and have execution therefor; and it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court with direction to enter a judgment for the plaintiff on bond No. 78 for $500, with proper interest thereon, less a credit on said bond of $290 of the date of November 8, 1875; and as to the other bonds sued on, to enter a judgment for the defendant, with costs.

3D NOVEMBER, 1884.

You, therefore, are hereby commanded that such execution and further proceeding be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice and the laws of the United States ought to be had, the

23 said writ of error notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the nineteenth day of February, in the year of our Lord one thousand eight hundred and eighty-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Costs of Defendant.

And in accordance with the commands of its mandate it is now here considered, ordered, and adjudged that the said plaintiff have and recover of and from the said defendant, The City of Fort Scott in the State of Kansas, upon bond number seventy-eight (78) sued on herein, the sum of four hundred and thirty-four dollars, with ten per cent. interest from this date, together with his costs expended, and to be taxed herein up to May 18th, 1881, and process is awarded therefor; and it is further considered, ordered, and adjudged that as to all other bonds and claims sued on herein and mentioned in plaintiff's original petition and amendments thereto the said defendant go hence without day, and that said defendant have and recover of and from the said plaintiff, Samuel G. Hickman, all of its costs expended herein, which have accrued from and since the said 18th day of May, 1881, and also have and recover of and from the said plaintiff, Samuel G. Hickman, the costs of the said Supreme Court, amounting to one hundred and eight and $\frac{30}{100}$ dollars, and execution is awarded therefor.

24 Circuit Court of the United States for the District of Kansas.

SAMUEL G. HICKMAN
vs.
THE CITY OF FORT SCOTT. } No. 3139.

The facts of this case are as follows:

Plaintiff brought his action on certain bonds and coupons issued by the defendant. The case was tried in the circuit court without a jury. Findings of fact were made and judgment entered thereon in favor of the plaintiff. This judgment was taken to the Supreme Court and in November, 1884, an opinion was filed in said Court and a judgment entered reversing the decision of the circuit court and directing it to enter judgment on the facts in favor of the defendant. Before the mandate issued a motion was filed in the Supreme Court for a rehearing or at least an order granting a *venire de novo.* This was overruled. No opinion was filed at the time of overruling this motion, so that the reasons for that action are left open to conjecture.

After this disposition of the case in the Supreme Court and the filing of the mandate in this an application was here made upon substantially the same showing for a new trial or a correction of the record by a change of certain findings and an addition of other findings which it is claimed were proper and necessary upon the testimony.

This application brings up these questions:

1st. Whether this court can upon the showing order a new trial.

2nd. Whether, if not, it can change the findings already made or add other findings based upon the testimony presented at the trial.

Upon the first question I have little doubt. A new trial is
25 never awarded upon the mere showing of the existence of other testimony sufficient to induce a different conclusion. Satisfactory reasons must always be given for its non-production at the trial already had. None such are given or even suggested in this application. The only matters suggested as excuses for the condition of the record or as furnishing a basis for any action at the present time are matters transpiring after the conclusion of the

testimony. Hence, if there are any matters which could have been offered in evidence and were not, the plaintiff is alone to blame and must abide by the result.

As to the other question there is more doubt. It is claimed that upon the testimony actually given certain facts were proved which are not noticed in the findings, and also that there was a mistake in some of the findings, and I am asked to correct the mistakes, and also add findings of the omitted facts. Thus, as counsel argue, the record will be made to speak the truth and the judgment of the Supreme Court may be given upon the truth and the whole truth. As excuse for the present condition it is stated as follows:

"The cause was tried at November term, 1883, of the circuit court for this district before Circuit Judge McCrary and District Judge Foster and at the closing argument Judge McCrary stopped the counsel for the plaintiff and announced that the court found for the plaintiff. When asked by counsel if he so found upon any specific facts his honor stated that he found for the plaintiff upon all the facts and circumstances in the case, and further stated in that connection in substance that the spreading of the circular of September 3, 1878, addressed to the bondholders on the records of the defendant corporation was a sufficient notice to all the world.

Very soon after Judge McCrary was taken ill and was
26 obliged to leave for his home before the findings could be
prepared and submitted to the court. The matter therefore came up before the district judge alone, and for several days at intervals there was constant difference of opinion between the opposing counsel as to what the findings should be, each insisting on certain findings in his favor which he claimed were warranted by the evidence. The result was that the judge became weary of the controversy and signed the findings, as shown by the record taken to the Supreme Court, adopting generally those prepared by the counsel for the city. The counsel for the plaintiff considered the findings, which subsequently appeared in the record prepared for the Supreme Court, sufficient if Judge McCrary's opinion as to the conclusiveness of the entry of record of the circular of September 3, 1878, was sustained, and he doubtless took it for granted that if that opinion was reversed an opportunity would be afforded in this court to prove such other facts or to correct the findings in accordance with the facts already proven. He was not therefore as strenuous and importunate as he might otherwise have been in supervising such findings and in including all matters in the record favorable to the plaintiff. His action in this respect, as your petitioner is informed and believes, was due to the fact that although the circuit judge stated at the conclusion of the argument, as already mentioned, that he found for the plaintiff on all the facts and circumstances of the case, he laid special stress on the circular already mentioned appearing upon the record of the corporation defendant as in itself sufficient.

Moreover, the omission of some of the findings of fact is, under the circumstances of the case, further to be accounted for by the

voluminous character of the record. The records and files in
27 the cause aggregate about one thousand pages, and, in view
of the illness and consequent absence of the presiding judge, of the pressure under which the findings of fact were prepared, and of the disagreements between counsel as to very many of them, it is not surprising that many matters contained in this voluminous record were accidentally overlooked or mistakenly stated.

While there is something in this which appeals to favorable consideration, I think the application must be refused.

Counsel for plaintiff concede that there is no precedent for the action desired, and I think this case should not furnish one, and for these reasons, viz:

1st. There is no sufficient excuse presented for a failure to have the findings of fact made more complete. The trial judge stated that he found for the plaintiff upon all the facts, and, while he emphasized one particular matter, yet he did not base his judgment upon that alone; but, further, the fact that findings of fact were desired by the defendant was notice that a review was sought in the Supreme Court, and the very vigor with which counsel for the defendant insisted on the findings as they were finally settled was a full notice to plaintiff's counsel not merely that the case would be taken to the Supreme Court, but that every reasonable effort would be made to secure a reversal. Under those circumstances laches on the part of counsel is inexcusable. Doubtless, as stated, he believed that this one matter was enough to rest his case on and trusted to that.

2nd. It is no true way to try cases to have a series of facts found, obtain the opinion of the Supreme Court thereon, and then ask to have other facts added to the record for the sake of obtaining a second opinion from that court.

28 3rd. The plaintiff is seeking what may be called a sort of
nunc pro tunc entry of findings. Now, shall these omitted findings state the conclusions which the trial judges had or would have come to from the testimony then before them? If so, how can that be ascertained? It cannot be supposed that trial judges are bearing in their memories for two to three years the facts of a case or conclusions then reached by them upon minor matters. If it be said that the testimony is in writing and their recollection can be refreshed, that is only partially true, for there was some oral testimony not reduced to writing, and even from an examination of the written testimony can it be that those judges could accurately remember the conclusions then reached by them? And if, on the other hand, I was to state the conclusions which I might draw from that testimony, the anomaly would be presented of a set of findings—part the conclusions of one trial judge and the other part the conclusions of another trial judge. It certainly cannot be that I should be at liberty to change the findings made. How can I say that from the testimony, written and oral, the findings as they are do not express the conclusions really reached by the trial judges?

4th. If all the changes were made and the findings of fact stated as counsel now ask to have them stated it is not clear from the opinion filed by the Supreme Court that a different conclusion would be reached by it. Especially am I led in this direction by the fact that it overruled the application presented. For these reasons the application will be denied.

Endorsed: 3139. Samuel G. Hickman *vs.* The City of Fort Scott. Opinion. Filed Apr. 13, 1885. A. S. Thomas, clerk.

29 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 24th day of November, A. D. 1884, proceedings were had and appear of record in words and figures following, to wit:

SAMUEL G. HICKMAN }
vs. } 3139.
THE CITY OF FORT SCOTT. }

MONDAY, *April* 13, 1885.

The plaintiff's application, filed herein, to amend the record in this action came on to be heard and was argued by counsel; on consideration whereof the court doth overrule said application.

30 Know all men by these presents that we, D. A. Moulton and Samuel G. Hickman, are held and firmly bound unto the defendant, The City of Fort Scott, its successors and assigns, in the full and just sum of five hundred dollars; which bond, well and truly to be paid, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this seventh day of April, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, in a suit pending in the circuit court of the United States for the district of Kansas, wherein Samuel G. Hickman was plaintiff and The City of Fort Scott was defendant, a judgment was rendered against the said plaintiff, and said plaintiff having prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid, and a citation having issued, directed to the said City of Fort Scott, citing and admonishing it to be and appear on the second Monday of October, 1887, at the session of the Supreme Court to be holden in Washington:

Now, the condition of the above obligation is such that if the said Samuel G. Hickman shall prosecute his writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

D. A. MOULTON,
SAMUEL G. HICKMAN,
By ROSSINGTON, SMITH & DALLAS, *Att'ys.*

Sealed and delivered in the presence of—
H. L. CALL.

Approved April 9, '87.
C. G. FOSTER, *Judge.*

31 Endorsed: No. 3139. Samuel G. Hickman *vs.* The City of Fort Scott. Appeal bond. Filed April 9, 1887. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

32 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy from the record of the proceedings of said court in the action of Samuel G. Hickman *vs.* The City of Fort Scott, No. 3139 in said court, of petition of plaintiff to amend the record in said action, and all subsequent proceedings in said court in said entitled action.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 9th day of April, A. D. 1887.

A. S. THOMAS, *Clerk.*

33 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Samuel G. Hickman, plaintiff, and The City of Fort Scott, Kansas, defendant, a manifest error hath happened, to the great damage of the said Samuel G. Hickman, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 7th day of April, A. D. 1887.

A. S. THOMAS,
Clerk of the Circuit Court of the United States
for the District of Kansas.

[Endorsed:] No. 3139. Samuel G. Hickman *vs.* The City of Fort Scott. Writ of error. Filed April 7, 1887. A. S. Thomas, clerk.

34 SAMUEL G. HICKMAN, Plaintiff,
vs.
THE CITY OF FORT SCOTT, Defendant. } No. 3139.

United States of America to The City of Fort Scott, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, wherein Samuel G. Hickman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

C. G. FOSTER, *Judge.*

35 SAMUEL G. HICKMAN, Plaintiff,
vs.
THE CITY OF FORT SCOTT, Defendant. } No. 3139.

United States of America to The City of Fort Scott, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, wherein Samuel G. Hickman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

C. G. FOSTER, *Judge.*

A true copy.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

Attest: A. S. THOMAS, *Clerk,*
By FRANK J. THOMAS, *Deputy.*

April 9, 1887.

Service of above citation is this day admitted.
Fort Scott, Kansas, April 22d, 1887.

J. D. McCLEVERTY,
Def't's Att'y.

36 [Endorsed:] Sup. Court U. S. 1886, October term. No. 318. Samuel G. Hickman, pl'ff in error, *vs.* The City of Fort Scott. Citation.

[Stamped:] Office Supreme Court U. S. Filed Apr. 27, 1887. James H. McKenney, clerk.

37 Law office of
Ware & Ware.

E. F. Ware.
C. L. Ware.

FORT SCOTT, KANSAS, *Aug.* 3, 1885.

In the Circuit Court of the United States, District of Kansas.

SAMUEL G. HICKMAN, Pl'ff,
vs.
THE CITY OF FORT SCOTT, State of Kansas, Def't. } No. 3139.

Payment and satisfaction in full of the judgment herein rendered in favor of said plaintiff is hereby acknowledged this 3d day of August, 1885.

WARE & WARE,
Att'ys for Pl'ff.

Endorsed: No. 3139. Samuel G. Hickman *vs.* The City of Fort Scott. Satisfaction of judg't *vs.* def't. Filed Aug. 6, 1885. A. S. Thomas, clerk, by Frank H. Holt, deputy.

Which said satisfaction was entered of record upon the appearance docket of said court and appears there of record in the words and figures following, to wit:

"SAMUEL G. HICKMAN
vs.
THE CITY OF FORT SCOTT. } 3139.

1885, Aug. 6, satisfaction of judg't *vs.* def't filed as follows:

FORT SCOTT, KANSAS, *Aug.* 3, 1885.

In the Circuit Court of the United States, District of Kansas.

SAMUEL G. HICKMAN, Pl'ff,
vs.
THE CITY OF FORT SCOTT, State of Kansas, Def't. }

Payment and satisfaction in full of the judgment herein rendered in favor of said plaintiff is hereby acknowledged this 3d day of August, 1885.

WARE & WARE,
Att'ys for Pl'ff.

Aug. 6, $17.80, costs taxable *vs.* def't, paid by J. D. McCleverty, att'y for def't: Clerk, 6.60; marshal, p'd by pl'ff, 11.20."

38 UNITED STATES OF AMERICA,
District of Kansas, } *ss:*

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy from the record and papers of said court of an entry of payment and satisfaction of the judgment rendered in favor of the plaintiff, dated August 3, 1885, and marked as filed on the 6th day of August, 1885, of record in the circuit court of the United States for the district of Kansas, in the action of Samuel G. Hickman *vs.* The City of Fort Scott, No. 3139 in said court.

The Seal of the Circuit Court
of the United States, District of Kansas, 1862.

In testimony whereof I hereunto set my hand and affix the seal of said court, at my office, in Topeka, in said district of Kansas, this 14th day of February, A. D. 1888.

A. S. THOMAS, *Clerk.*

39 THE UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States to the judges of the circuit court of the United States for the district of Kansas, Greeting:

Whereas in a certain suit in said circuit court between Samuel G. Hickman, plaintiff, and The City of Fort Scott, Kansas, defendant, which suit was removed to the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"That an entry of payment and satisfaction of the judgment rendered in favor of the plaintiff and signed by Ware & Ware, attorneys for the plaintiff, dated August 3, 1885, and marked as filed on the 6th day of August, 1885, of record in the circuit court of the United States for the district of Kansas, is omitted from the transcript-."

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the eighth day of February, A. D. 1888.

JAMES H. McKENNEY,
Clerk Supreme Court U. S.

40 [Endorsed:] Supreme Court U. S. October term, 1887. No. 318. Samuel G. Hickman, pl'ff in error, *vs.* The City of Fort Scott. Writ of certiorari and return. No. 3139. Filed Feb. 14, 1888. A. S. Thomas, cl'k.

[Stamped:] Office Supreme Court U. S. Filed Feb. 17, 1888. James H. McKenney, clerk.

Endorsed on cover: Kansas C. C. U. S. No. 318. Samuel G. Hickman, plaintiff in error, *vs.* The City of Fort Scott. Filed April 21, 1887.

No. 931. *October Term, 1887.*

IN THE

Supreme Court of the United States.

SAMUEL G. HICKMAN,
Plaintiff in Error,

VS.

CITY OF FORT SCOTT, KANSAS,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR,

In opposition to the Motion for a *Certiorari* on Suggestion of Diminution of Record.

WAYNE MacVEAGH,
For Plaintiff in Error.

Allen, Lane & Scott, Printers, Nos. 229, 231, and 233 South Fifth Street, Philadelphia.

In the Supreme Court of the United States.

Samuel G. Hickman vs. *City of Fort Scott, Kansas.*	October Term, 1887. No. 931.

BRIEF OF PLAINTIFF IN ERROR, IN OPPOSITION TO THE MOTION FOR A CERTIORARI ON SUGGESTION OF DIMINUTION OF RECORD.

The original case of Fort Scott *vs.* Hickman was decided by this court in November, 1884. (See 112 U. S., 150.)

The case related to the right of recovery against the city of Fort Scott of principal and interest on twenty-seven bonds of that municipality. The judgment of this court was against the right of recovery on twenty-six of the bonds, by reason of the statute of limitations, and in favor of the right of recovery on one of the bonds only by reason of a part payment endorsed thereon, which took the case out of the statute. The court below had found for the plaintiff as to all of the bonds. This court reversed the court below, and remanded the case, directing the entry of a judgment for the plaintiff for the amount of said one bond (No. 78) with interest, less a credit for the amount which had been paid upon it. As to the other twenty-six bonds, the court directed a judgment for the defendant with costs. Upon the record being taken down to the lower court, payment was made to Messrs. Ware & Ware, attorneys, who were employed by the plaintiff's counsel, Mr. Brown, without the knowledge of the plaintiff, of the amount due on the one bond, No. 78, for which judgment was directed in the plaintiff's favor.

Thereupon Messrs. Ware & Ware satisfied *that* judgment. The judgment for the defendant on the remaining twenty-six bonds was a distinct judgment, and upon the record being before the Circuit Court upon mandate, certain evidence was offered for the purpose of showing that the judgment had been directed by this court upon a supposed state of facts contrary to the facts really existing. The court, notwithstanding the application for leave to introduce this evidence, directed judgment as to said twenty-six bonds for the defendant. It is to this judgment that the present writ of error is taken. The suggestion of diminution, now made for the first time, is that the record as filed in this court does not show the entry of satisfaction in the court below upon the judgment for the plaintiff on the one bond, No. 78, as directed by this court in its opinion. (112 U. S., 150.)

It is submitted that this entry of satisfaction, even if it had been made with the knowledge of the plaintiff, is not relevant to the issues raised by the present case, which arise upon a writ of error taken from another and distinct judgment, in favor of the other party in interest—the defendant. The *certiorari* should therefore not be allowed, as it would only complicate the record now complete, by the introduction of matter wholly irrelevant to the proper decision of the issues now before the court.

WAYNE MACVEAGH,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED.
AUG 27 1891
JAMES. H. McKENNEY,
CLERK.

No. 10. October Term, 1891.

In the Supreme Court of the United States.

Samuel G. Hickman,
Plaintiff in Error,

vs.

The City of Fort Scott.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF OF PLAINTIFF IN ERROR.

A. H. WINTERSTEEN,
WAYNE MACVEAGH,
For Plaintiff in Error.

Allen, Lane & Scott, Prs., Phila.

SUPREME COURT OF THE UNITED STATES.

Samuel G. Hickman

vs.

The City of Fort Scott.

October Term, 1891.

No. 10.

STATEMENT.

The case comes here on writ of error to the Circuit Court of the United States for the district of Kansas for its refusal, upon petition filed by plaintiff in error, to permit additional proofs to be made in the cause, and to permit the record to be amended so as to have the findings of facts show the actual facts as established at the trial.

The original case of *Hickman* vs. *Fort Scott* was an action to recover of the defendant the principal and interest due on twenty-seven of its bonds of $500 each. It was tried at November term, 1883, by the court without a jury, and resulted in a verdict for the plaintiff. It was brought into this court by the city of Fort Scott and submitted for decision upon an imperfect record. This court reversed the lower court and directed the entry of judgment for the defendant as to all of the bonds sued on save one, and directed judgment for the plaintiff on that one. The case is reported as Fort Scott *vs.* Hickman, in 112 U. S., 150.

Upon the filing of this court's mandate in the lower court, the petition above referred to was presented to the lower court to have the errors of record corrected so as to enable the plaintiff to obtain the judgment of this court upon all the facts. The opinion of the Circuit Court refusing the prayers of the petition is printed in the transcript of record, page 13.

SPECIFICATION OF ERRORS.

1. The court below erred in refusing the plaintiff's prayer to amend the record so as to have it show the actual facts established at the trial.

2. The court below erred in refusing the plaintiff's prayer for the taking of additional proofs of the facts bearing on the issues involved in the case, as set forth in the petition filed.

ARGUMENT.

The Motion to Dismiss.

The defendant in error has moved to dismiss this case for the following reasons:—

1. That the proceedings in error herein were not commenced, nor the citation served, within two years of the judgment sought to be reversed.

2. That after said judgment was rendered, and after the petition to correct the findings of fact upon which said judgment was based had been heard and passed upon, the said Samuel G. Hickman accepted and collected payment of said judgment.

The grounds for this motion seem to be frivolous and not warranted by the facts and the law.

The judgment sought to be reversed was entered, as is shown by the date of the opinion filed, April 13th, 1885. (Record, page 16.)

The writ of error was taken out April 7th, 1887, and the bond filed and citation issued April 9th, 1887. (Record, pages 16, 18.)

The writ of error was therefore amply in time.

The citation, though issued before, was not served till after the two years. Service of the citation was admitted April 22d, 1887.

But it is not necessary for the citation to be served before the expiration of the two years. The writ of error only must be brought within two years.

Rev. Stat., section 1008.

A citation may be served afterwards. The contemplation of the act of Congress was that it should be served before the return day and returned with the writ of error.

Rev. Stat., section 997.

But even this provision of the law is not mandatory.

Dayton vs. *Lash., 94 U. S., 112.*

The writ was filed in this court April 21st, and the citation, April 27th, 1887 (Record, pages 18, 20), although, under the law, it was not necessary to return them till the second Monday of the succeeding October.

The second ground for the motion to dismiss, that the judgment has been satisfied, is based upon the acknowledgment of satisfaction by the plaintiff's attorney (Record, page 19) of the judgment rendered in his favor. This court, in deciding the case originally upon the facts before it, directed two judgments to be entered, one for the plaintiff on bond No. 78, and the other for the defendant on the remaining bonds. The entry and acknowledgment of satisfaction was confined to the judgment in favor of the plaintiff, and does not apply to the *status* of the judgment for the defendant, which remains unaffected by any entry of the kind.

The Case on the Merits.

Whatever may appear exceptional in the character of the relief asked in the present case is due wholly to the exceptional nature of the case itself growing out of exceptional facts.

This court, in its previous adjudication, ruled that, upon the facts shown in the printed transcript of record then before it, there was no acknowledgment by the defendant of the debt represented by the bonds in suit within five years so as to remove the bar of the statute. It was held that in the absence of evidence of acknowledgment of the debt to the plaintiff or his representative the statute of limitations was a full defense. The ground upon which the lower court principally went in giving judgment for the plaintiff, that the spreading upon the records of the city councils of the circular-letter of September 3d, 1878, was an acknowledgment of the debt, was discarded. The case had been tried before the court below sitting as a jury, and a large amount of testimony had been taken. The records and files in the cause aggregated about one thousand pages. The court below having taken the view that the spreading on the city records of the circular-letter of September 3d, 1878, removed the statutory bar, the findings of fact, as determined upon, did not contain all the important facts bearing on other branches of the case. The record as made up for this court was therefore not in fact a true record of the facts established in the court below. It was especially defective in not showing the facts as they existed, proving that the city of Fort Scott acknowledged the obligation of these bonds by notice to the plaintiff's representative. It was chiefly the absence of this proof from the record which came before this court for review that made necessary the reversal of the case. This court found from the record :—

1. That the circular-letter of September 3d, 1878, was not sent to the plaintiff or to any agent or representative of his, or to any other holder of the special improvement or Macadam bonds.

The facts as to this were that the circular in question was sent to and received by Henry Buckwalter, Sr., of West Chester, Pa., who was the original holder of the bonds in suit, and who at no time held any other class of bonds of the city of Fort Scott than Macadam bonds. At the time the circular was received by the said Buckwalter, he was acting as the general agent of the plaintiff in connection with the said bonds.

2. That the circular-letter was not intended to be sent to the holders of Macadam bonds.

The facts are that the committee recommended that the circular "be sent to each person holding city and school district bonds, except Macadam bonds," but that the city council adopted a resolution omitting the exception, and directed the clerk to send one hundred copies to the holders of the *city* bonds, and that, in accordance therewith, the clerk sent a copy of the circular to Henry Buckwalter, Sr., as aforesaid.

Other facts showing an acknowledgment to the plaintiff of the obligation of these bonds are set forth in the petition filed. (Record, pages 4–8.)

I. Cary Carver, of West Chester, Pa., who was in the employ of James H. Brown, the duly authorized agent of the city of Fort Scott, received from the latter in September, 1878 a copy of the circular of September 3d, 1878, signed in writing by the city clerk, to be shown to all bondholders of the said city in the vicinity of West Chester, without distinction as to the character of the bonds held by them. The plaintiff was shown the circular by the said Carver, and was requested to give the numbers of the Macadam bonds held by parties in the vicinity of West Chester, to be forwarded to Brown. Plaintiff did so, and the numbers correspond with the numbers of those sent to Donnell, Lawson, and Simpson in letter of J. H. Randolph, August 6th, 1875, and with some of those in suit. Plaintiff was, at the time of seeing the circular, a holder of both school and Macadam bonds, and accepted the compromise offered on the school bonds because of the large total indebtedness of the city, swollen by the statement in the circular of a large Macadam indebtedness.

James H. Brown, the agent of the city, in April, 1879 went to Henry Buckwalter, Sr., the agent of the plaintiff, proposing a compromise of the Macadam bonds at fifty cents on the dollar. Subsequently, in the month of May, 1879, Brown, on behalf of the city, met the bondholders at West Chester with reference to a compromise, and later an offer of sixty-five per cent. was made by said Brown, which was confirmed by a letter written by Brown to Buckwalter, May 24th, 1879, stating specifically the nature of the compromise as offered. Coincident with all this was the inaugural address of the mayor of the city of Fort Scott, after the circular-letter was issued, acknowledging the Macadam bonds as a debt of the city, which address was adopted by the city council and placed at large upon its records. There was also levied and collected by the city a special tax for the purpose of paying these bonds. This money was deposited as a special fund in the city treasury for that purpose.

The omission of these facts from the record establishes it as very imperfect.

When the case was last here, the court could, perhaps, do nothing else but reverse upon the condition of the record, and direct judgment to be entered for the defendant. After the decision of the case, the plaintiff, upon a motion for a reargument or a new venire, sought to have the court consider the case anew, or direct the lower court to correct the record by placing in it the facts as they existed. If the only proper function of this court was to send the case back with a mandate for judgment upon the record as then made, it must be because such a mandate left it to the lower court to place the record in proper shape as justice to the parties might require. The lower court, however, took the position that it was not practicable or lawful to do anything else than simply execute the mandate of this court, and that, however imperfect or defective the former record was, the judgment upon it was final for all purposes.

It is submitted, in view of the grossly defective record transmitted to this court, which contained in no sense the case made by the proofs, that the position of the lower court carries the doctrine of *ut sit finis litium* further than the law requires, or else that it is the duty of this court to afford relief.

If the court below was bound to execute the mandate sent down by the entry of judgment in accordance with its terms, the mandate having been executed and the judgment having become upon its entry there a judgment of the Circuit Court, the court, upon the defective condition of the record being shown, was then in furtherance of justice at liberty to state the fact and correct the record. The alleged record upon which the case went to the Supreme Court was not the record of the court, and the court was at liberty to say so. The court declined to take this view because of the difficulty in determining the facts established on account of the absence of one of the judges who sat at the trial. But practically all the facts proven were on file in the court, and all that was needed was to make the findings conform thereto. If a mistake or omission existed, the court, being open, although its personnel might have changed, was, if other reasons prevailed, bound to act and correct the error if convinced of it.

The court conceived that no sufficient excuse was offered for the failure to have the record show all the facts. It is submitted that the best excuse possible appears in the error of the court itself in so emphasizing the effect of the spreading of the circular-letter of September 3d, 1878 upon the records of the city, that the other and proper matters of proof were obscured in the findings.

It must not be overlooked that the findings of fact sent up by the court as the record were not the findings of counsel, much less of counsel for the plaintiff, but *were findings of the court.* It was therefore its duty to state all the material facts and not by a foregone conclusion, as to the effect of a certain branch of the evidence, imperil the plaintiff's whole case by omissions in its findings.

Nor is the fact that this court has already refused to grant a reargument conclusive, as considered by the lower court. This court could act only on the record before it, and what purported to be the record, sent up before, did not, as the court thought, justify anything else than its former conclusion. But the true record remained unconsidered, and it was that the plaintiff sought to have sent up. The petition for the perfection of the record was addressed to the lower court as a distinct and independent application. Not to have granted it or even to have considered whether the testimony, when looked into, bore out the allegations made, was equivalent to a denial of justice under the form of complying with the mandate of this court.

The case is in effect this: A judge sitting in place of a jury finds one fact which, in his opinion of the law, renders the finding of other facts equally well established unnecessary. He therefore not unnaturally omits to find them, though clearly proven, as is apparent from the record. His conclusion of law as to the fact he has found is reversed, and thereupon it is contended there is not to be a new trial or a new finding of the omitted facts, but a final judgment based on the judge's mistaken omission from his findings of the controlling facts apparent in the record.

Such a position, it is conceived, this court will not sustain.

It is submitted that, in view of the whole case, this court, having the facts and the equities arising out of them before it, should at least direct the court below to examine and consider whether a true and perfect record, showing the facts established by the proofs before it, was in fact sent up to this court. Unless this be done, the judgment heretofore entered by this court, based on a partial and imperfect record, works only injustice to the plaintiff.

A. H. WINTERSTEEN,
WAYNE MACVEAGH,
For Plaintiff in Error.

FILED
OCT 10 1891
JAMES H. McKENNEY,
CLERK.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

SAMUEL G. HICKMAN,
Plaintiff in Error.
vs.
THE CITY OF FORT SCOTT, KANSAS,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

J. D. McCLEVERTY,
Atty. for Deft. in Error.

JAMES A. MOULTON, PRINTER, FORT SCOTT, KANSAS.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

SAMUEL G. HICKMAN,
Plaintiff in Error.
VS.
THE CITY OF FORT SCOTT, KANSAS,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

THE MOTION TO DISMISS.

A preliminary question arises in this case upon defendant's motion to dismiss; one ground of which motion is that after this case had been decided in this court, as reported in Fort Scott vs. Hickman, 112 U. S., 150, and after the pitition for a rehearing, or whatever it may be called, now under consideration, had been heard and decided, the plaintiff accepted the judgment which was rendered pursuant to the mandate of this court, received and collected the amount adjudged to be due, and entered a satisfaction in full of the judgment.

The facts and dates are as follows: The case was decided in this court on Nov. 3d, 1884, and the mandate issued under date of February 19th, 1885.—Record, pp. 9, 10. March 2d, 1885, the mandate was entered of record in the lower court and judgment rendered the same day pursuant thereto.—Record, pp. 11, 12, 13. The petition to make additional findings now under consideration was heard in the lower court and decided April 13th, 1885.—Record, pp. 13, 16. The satisfaction of the judgment was filed by plaintiff in the lower court August 6th, 1885, and then entered of record upon the appearance docket as follows, to-wit:

"Samuel Hickman,
vs.
The City of Fort Scott. } No. 3135."

1885, Aug. 6th, satisfaction of judgment vs. defendant filed as follows:

"In the Circuit Court of the United States, District of Kansas:

Samuel Hickman, *Plff.*
vs.
The City of Fort Scott, State of Kansas, *Deft.*

Payment and satisfaction in full of the judgment herein rendered in favor of said plaintiff is hereby acknowledged, this 3d day of August, 1885.

WARE & WARE,
Att'ys for Pl'ff."

The writ of error herein was issued April 7th, 1887,—Record, p. 17,—and citation served April 22d, 1887,—Record, p. 18.

It will thus be noticed that the judgment below, which plaintiff now attacks and asks to have set aside, was fully satisfied by him nearly two years before he sued out his writ of error. A satisfaction which he not only permitted to remain unquestioned during all of that time, but still retains the money, the fruit of that judgment; does not offer to refund it, nor to have the satisfaction cancelled or set aside, but while fully acquiescing in and assenting thereto, prosecutes this proceeding in error and seeks to have that very judgment set aside and practically a new trial granted. It will be noticed that the judgment as rendered covered all the issues in the case and settled the whole controversy. Had an execution issued, as it might against an individual, a levy and sale taken place and the money thus realized and the judgment satisfied, it would scarcely be believed that the plaintiff could thereafter prosecute a writ of error to this court, but that could be no more certainly a satisfaction of the judgment than was the receipt of the money voluntarily paid and accepted. If a past due note should be paid and a receipt taken against it, certainly no action could be maintained upon the note; or if after suit and judgment it should be paid, the money accepted and the judgment satisfied of record, certainly such receipt and satisfaction would estop a plaintiff from further prosecuting his case upon error of appeal. If he desires to appeal he must do so before he settles the controversy by accepting payment as tendered him by the defendant. The courts have always encouraged the settlement of cases by the tender and acceptance of payment, as was done in this case, and have always held that such tender and acceptance was an end of all controversy. Here the defendant made an offer of judgment under the Statute; judgment for that amount was finally rendered, the judgment paid and satisfied, and the money is still retained and kept. The plaintiff was not then obliged to accept payment and enter a satisfaction, but having voluntarily done so he should not now be allowed to reconsider his action, especially while still retaining the proceeds. If such conduct will not end litigation then the efficacy of tender and acceptance is of little avail. If decided cases be necessary, a few may be cited.

In Babbitt vs. Corby, Admr., 13 Kan., 612, it is held that one who "voluntarily takes the benefits of a judgment will not be permitted to say there was error in such judgment." That was an action in ejectment where one party claimed under a tax title deed. The tax deed was held void, and the amount due for tax redemption thereunder adjudged a lien upon the land. The tax title claimant carried the case to the Supreme Court. Thereafter the land was sold under the judgment and the amount of the tax lien paid into court, which was paid to and accepted by him, and the court upon that showing sustained a motion to dismiss.

In Hoffmire vs. Holcomb, 17 Kan., 378, Mr. Justice Brewer, now of this court, uses this language, which fully explains the case:

"This was an action in the District Court of Dickinson County to foreclose a mortgage. A decree was entered and sale made. James Hoffmire, the grantee of the mortgagor, and who held the fee at the time, is the only party complaining here. On the sale the property realized more than the claims against it. Upon confirmation the District Court ordered that the surplus be paid over to Hoffmire as the owner of the land, and it was so done. Having received such surplus, can he now question the sufficiency of the proceedings? We think not. *A party cannot voluntarily appropriate the benefit of judicial proceedings and at the same time maintain an action to have them set aside.*"

Again, in Bradley vs. Rogers, 33 Kan., 120, it was held that a party who in an ejectment suit institutes proceedings under the occupying-claimant law, though a part of the proceedings in the case, and though he excepted to the award and refused to receive the amount, had by so doing accepted the fruits of the judgment in ejectment and was estopped from instituting proceedings in error to reverse it.

In Price vs. Allen, 39 Kan., 476, where the defendant had the improvements assessed under the occupying-claimant law, and the plaintiff was required by order of court to elect within twenty days whether he would pay the assessed value of the improvements or receive the assessed value of the land, and the plaintiff under protest elected to receive the assessed value of the land, the court held he could not then carry the case to the Supreme Court; that thus accepting the fruit of his judgment was an end of litigation.

In Little vs. Bowers, 134 U. S., 547, this question is discussed at length, and where pending an appeal to test the validity of certain taxes, the taxes were adjusted and paid, the court sustained a motion to dismiss, though the payment had been made to prevent the sale of the land assessed, and the party in good faith was acting upon the belief that such payment would not affect the pending appeal to this court, and that such motion might be made at any time, even after the case had been argued and submitted upon the general merits.

The other ground of the motion is that this proceeding was not begun until more than two years after the judgment had been rendered in the lower court.

The real point of attack is the general judgment in the Circuit Court, which was rendered March 2d, 1885.—Record, pp. 11, 12, 13. The writ of error was issued April 7th, 1887, and the citation served April 22d, 1887.—Record, pp. 17, 18, more than two years after the judgment in the action was rendered. It is true the claim made is that the ruling now attacked is the ruling of April 13th, 1885.—Record, p. 16,—upon this application to open the judgment and make additional findings, but unless they can reach back beyond the two years fixed by the Statute and attack the general judgment, there would be but little purpose to the proceeding, and if the judgment is the point of attack, its date,—March 2d, 1885,—is more than two years before the proceedings in error was begun, and must govern.

THE GENERAL MERITS.

It is difficult to know what name to give to the petition now under consideration, but its purpose is to set aside this judgment. It was first presented to this court and denied, the court evidently finding no reason from the face of the original record, for changing its first decision, and a mandate was issued upon that decision. When the application or petition was denied here it was then filed in the lower court, and there denied also.

What additional reason there may be for this court changing its first ruling upon this petition does not appear. In the nature of things, before any court would grant such an application it would require evidence to prove the allegations made. Especially would it be true that evidence must have been produced to support this petition when it is remembered that Judge McCrary, who heard the original case, had resigned, and Judge Brewer had been appointed in his stead, and heard this petition. His opinion shows that his attention was called to the written evidence on file, but no bill of exceptions having been preserved of the oral evidence given on the trial, and finding that the case was presented to him in practically the same condition as it had been to the Supreme Court, he could see no reason for ruling differently from the Supreme Court. No bill of exceptions was preserved of the evidence presented to Judge Brewer, so that the case now stands, so far as this court is concerned, exactly as it stood when this petition was first presented here and denied. There being no bill of exceptions of the evidence even upon the trial, and upon which the original findings were based, it is certainly impossible for this court to say that those findings were not sustained by the evidence, or to say that the findings do not fully, clearly and honestly set forth every fact proven upon the trial, and it certainly also must be a fair presumption that the findings do set forth every fact that was shown at the trial. The duty of a trial court in making findings is to set forth all the facts, and it cannot be presumed at the mere suggestion of a defeated litigant and without any evidence to sustain it, that the trial court failed in this duty.

It cannot even be presumed that the plaintiff's attorneys failed in their duty or allowed any fact in evidence to be left out of the findings. The keen, alert lawyers who spent so much time taking depositions for the plaintiff in different parts of the country, and in looking up evidence for him, certainly did not fail to prove every fact within their knowledge, and to have full findings thereof made by the trial court. If mere assertion be either proper or necessary to sustain these findings, the counsel for defendant could very confidently assert that the findings do set forth all the facts. And that these findings sustain the judgment below this court has already determined. It will very much cheapen, if not destroy, the adjudications of courts if a party, after having tried his case, can set the judgment aside by merely stating that there are some additional findings which he thinks the trial court should have made, but about which it must be presumed the trial court differed with him, and some additional evidence which he believes, upon second thought, that he ought to have put in.

A careful reading of the petition will show that really no additional evidence was proposed to be offered, and very clearly no claim is made that any new evidence not known to the plaintiff at the time of the trial, and if he knew it and submitted his case without proving it he has lost his opportunity, his "day in court," and must abide the result.

This being so, the real question is, does the evidence given on the trial sustain the findings made by the trial court, and of this the trial court was the best judge, and in the absence of a bill of exceptions setting forth all of the evidence, the trial court is the sole judge. If the plaintiff in error had preserved a bill of exceptions then he might, perhaps, even in this way, challenge the attention of this court to the evidence, but having failed to do so, it must be presumed that the evidence sustains the findings, and that the findings set forth fully all the facts. If this be not so, then a new way has been discovered to prolong litigation, and when the end of a law suit would be reached no one could venture to guess, for the claim is made here not only that the findings and judgment ought not to conclude a party, but that the hearing and decision of the Supreme Court, and the payment, receipt and satisfaction of the judgment ordered by it, is not the end, but probably merely the beginning of litigation. If this is so, then there are but few cases tried, at least in recent years, that may not be opened up and tried anew.

Even equity will not interfere with a judgment at law unless a party has a just defence, which by fraud or accident, without fault upon his part, he was prevented from presenting, and the absence of his counsel, or that a witness upon whom he relied was so sick as to impair his recollection while testifying, or the failure to find a record relied upon as part of the evidence, would not be sufficient.

Crim vs. Hawley, 94 U. S., 652.

The only suggestion made now is that the counsel below failed to have full findings made, and possibly failed to put in all the evidence at hand, but even as to this no evidence is offered, nor is this either fraud or misconduct on the part of the defendant. Probably counsel proves that the contingent which tried the case was over confident as to their legal position, which was not realized until after defeat; but that is a common experience of lawyers, and has never yet been held to be a good ground for a new trial, while without the evidence it is impossible to say that error has been committed.

But in the most favorable light for the plaintiff, this petition or application to open up this judgment, was something that was addressed to the discretion of the court, and hence under the established rule of this court is not reviewable. To all intents and purposes it is a motion or application for a new trial, and this has always been held mere matter of discretion and from which error would not lie.

Miss. Pac. Rly. Co. vs. Chicago & Alton R. R. Co., 132 U. S., 191.

Newcomb vs. Wood, 97 U. S., 581.

Indianapolis & C. R. R. Co. vs. Horst, 93 U. S., 291.

The case last referred to declares—p. 301—"In courts of the United States, such motions are addressed to their discretion. The decision, whatever it may be, cannot be reviewed here. This is a rule of law established by this court, and not a mere matter of proceeding or practice in the Circuit and District Courts."

So to grant or refuse a motion for a rehearing in an equity case is not reviewable in this court.

Steines vs. Franklin Co., 14 Wall., 15.

Boesch vs. Graff, 133 U. S., 697.

And while this petition is an anomaly, it can scarcely be given greater merit than a motion for a new trial at law or for a rehearing in equity.

The proceeding, whatever it may be called, is unknown to the state practice in Kansas, and counsel for plaintiff fail to cite a similar case anywhere. In any event it is probably within the rule of federal practice that proceedings after judgment are not governed by local procedure, which would place this case within the decisions last cited, and being mere matter of discretion, will not be reviewed.

J. D. McCLEVERTY,
Atty. for Deft. in Error.

Fort Scott, Kansas, Sept. 30th, 1891.

JAN 31 1888

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

SAMUEL G. HICKMAN, *Plaintiff in Error*,
vs.
THE CITY OF FORT SCOTT, *Defendant in Error.*
No. 931.

Brief of Defendant in Error in Support of Motion for Certiorari on suggestion of Diminution of Record.

J. D. McCLEVERTY,
WM. A. McKENNEY,
For Defendant in Error.

R. O. Polkinhorn, Printer, Washington, D. C.

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In the Supreme Court of the United States.

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J. D. McCLEVERTY,
WM. A. McKENNEY,
For Defendant in Error.

R. O. Polkinhorn, Printer, Washington, D. C.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

SAMUEL G. HICKMAN, *Plaintiff in Error*, *vs.* THE CITY OF FORT SCOTT, KANSAS, *Defendant in Error*.	No. 931.

Motion for Writ of Certiorari.

Comes now the said defendant in error, by J. D. McCleverty, its counsel, and suggests the diminution of the record in this cause, in this, to wit:

1. That an entry of payment and satisfaction of the judgment rendered in favor of the plaintiff, and signed by Ware & Ware, attorneys for the plaintiff, dated August 3, 1885, and marked as filed on the 6th day of August, 1885, of record in the Circuit Court of the United States for the District of Kansas, is omitted from the transcript.

Wherefore, the said defendant in error moves the Court, under Rule 14, to award a *writ of certiorari*, to be issued and directed to the judges of the said Circuit Court, commanding them that, searching the record and proceedings in said cause, they forthwith certify to this Court those parts of the said record so omitted, as aforesaid.

J. D. McCleverty and
Wm. A. McKenney,
Of Counsel for Defendant in Error.

January 30, 1888.

IN THE SUPREME COURT OF THE UNITED STATES.

Samuel G. Hickman, *Plff. in Error,*
vs.
The City of Fort Scott, Kansas,
Deft. in Error.

State of Kansas,
Bourbon County, } *ss:*

J. D. McCleverty, being duly sworn, upon oath says: That he is attorney for the said defendant in error above named; that the record as filed in this court by said plaintiff in error is incomplete, in this, that after the judgment, which plaintiff in error now seeks to have set aside, was rendered in the circuit court for the district of Kansas, pursuant to the mandate of this court, the said defendant in error paid the full amount of said judgment, and the said plaintiff in error accepted such payment and entered a full satisfaction thereof, as shown by the additional portion of said record, which is hereto attached; that affiant believes it important to the determination of this case that the said record be completed by adding thereto the portion hereto attached, as showing an acquiescence in said judgment and an acceptance of the fruit thereof by this plaintiff, after the said circuit court had made the ruling which plaintiff in error now seeks to reverse, and also as showing an acquiescence in said ruling.

J. D. McCLEVERTY.

Subscribed and sworn to before me this 28th day of December, A. D. 1887. My commission expires Feb. 4, 1891.

[SEAL.] E. A. MUNSELL,
Notary Public.

TOPEKA, KANSAS, *Dec. 19th*, 1887.

"LAW OFFICE OF WARE & WARE,
FORT SCOTT, KANSAS, *Aug.* 3, 1885.

IN THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF KANSAS.

SAMUEL G. HICKMAN, *Plff.*,
vs.
THE CITY OF FORT SCOTT, STATE OF KANSAS, *Deft.*
} 3139.

Payment and satisfaction in full of the judgment herein rendered in favour of said plaintiff is hereby acknowledged this 3d day of August, 1885.

WARE AND WARE,
Att'ys for Plff.

Endorsed: No. 3139. Samuel G. Hickman *vs.* The City of Fort Scott. Satisfaction of judg't *vs.* deft. Filed Aug. 6, 1885. A. S. Thomas, clerk, by Frank H. Holt, deputy."

UNITED STATES OF AMERICA, *District of Kansas*, } *ss:*

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of a paper on file and of record in said court in the action of Samuel G. Hickman *vs.* The City of Fort Scott, No. 3139, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 19th day of December, A. D. 1887.

[SEAL.] A. S. THOMAS, *Clerk.*

The writ of error in this cause grows out of the case of *Hickman* vs. *City of Fort Scott*, which was decided in this court at the October term 1884, (No. 846 of that term.) See 112 U. S. 150.

Hickman brought his action in the Circuit Court of the United States for the district of Kansas, to recover the amount of principal and interest due on 27 bonds of the city of Fort Scott, and obtained a judgment in that court for $26,385,23, to bear interest at ten per cent per annum. The city of Fort Scott brought its writ of error to reverse that judgment. The case was heard at the October term, 1884, and the judgment of this court was that, "*The judgment of the Circuit Court is reversed, and the case is remanded to that court, with direction to inter a judgment for the plaintiff, on bond No.* 78, *for* $500, *with proper interest thereon, less a credit on said bond of* $290, *of the date of November* 8, 1875; *and, as to the other bonds sued on, to enter a judgment for the defendant, with costs.*"

On December 12, 1884, the defendant in error in the original cause petitioned this court for a rehearing or a *venire de novo*, and on December 22, 1884, this petition was denied.

On February 3, 1885, and after the petition for a rehearing had been denied in this court, Hickman appeared in the Circuit Court and filed his motion for leave to amend the record, stating as the ground of his application substantially the same reasons as were urged upon this court to obtain a re argument, as will appear by the present record.

On March 2, 1885, a judgment was rendered in the said Circuit Court pursuant to the mandate and in conformity to the opinion of this Court, and on April 13, 1885, the motion for leave to amend the record was overruled and denied.

On August 3, 1885, an entry of satisfaction of judgment was filed in the said Circuit Court, and is in the words and figures following, to wit:

"LAW OFFICE OF WARE & WARE,
FORT SCOTT, KANSAS, *Aug.* 3, 1885.

IN THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF KANSAS.

SAMUEL G. HICKMAN, *Pl'ff*,
vs.
THE CITY OF FORT SCOTT, STATE OF KANSAS, *Def't.*
} No. 3139.

Payment and satisfaction in full of the judgment herein rendered in favor of said plaintiff is hereby acknowledged this 3d day of August, 1885.

WARE & WARE,
Att'ys for Pl'ff."

On April 9, 1887, the bond on writ of error to this Court was approved.

The record, as presented to the Court by the plaintiff in error and No. 931 of the present term, is incomplete in this, that the entry of satisfaction of judgment, dated August 3, 1885, does not appear therein, and it is for the purpose of bringing up this portion of the record that this suggestion of diminution and motion for a certiorari is made.

The defendant in error, in his brief in opposition to this motion, makes two objections to granting the motion: (1.) That Ware & Ware, who entered satisfaction of that judgment, were employed by Mr. Brown, plaintiff's counsel, without the knowledge of the plaintiff, and it was to them that payment was made. To this it is a sufficient answer to say that Ware & Ware appear upon the record as of counsel for the plaintiff, and by reference to p. 26 of the record in the original case it will be seen that E. F. Ware signed the stipulation waiving the trial by jury, and on the last page of the same record he, as attorney for the plaintiff, acknowledges the service of citation. (2.) It is objected, also, that the entry of satisfaction is not relevant to the issues raised by the present case. In response to this, we say that it is not denied that it is a part of the record, and we submit that it is not proper to raise a question of materiality on a motion of this character, but that such question should be reserved and determined when the case is heard upon the merits.

That it is a part of the record is certified to by the clerk of the Circuit Court, as will appear by reference to his certificate, which is attached to the affidavit of Mr. J. D. McCleverty, and being a part of the record, and, as we believe, an essential part of it, we submit to the Court that we are entitled to have it brought up, in order that a complete record of the case may be presented for the inspection of this Court.

J. D. McCLEVERTY,
WM. A. McKENNEY,
For Defendant in Error.

A.D. 1852 October 14 Nº 384

TUCK'S SPECIFICATION

(3 SHEETS)
SHEET 1

Fig. 1

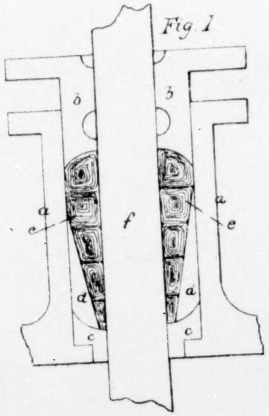


Fig. 3

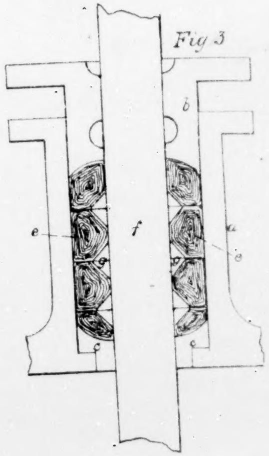


Fig. 5

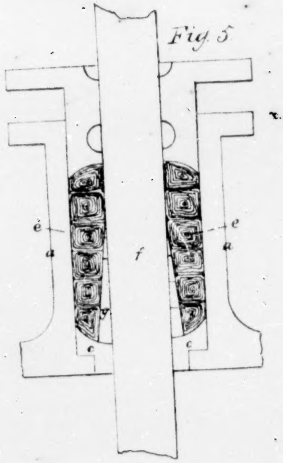


Fig. 7

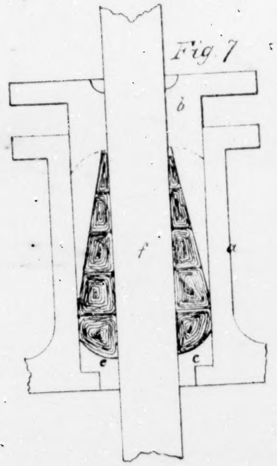


Fig. 9

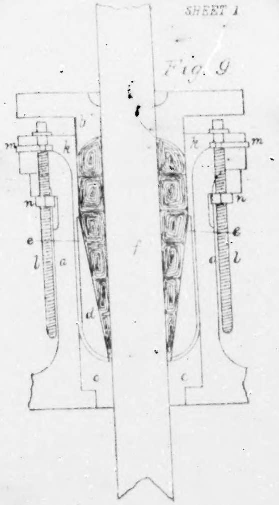


Fig. 2.

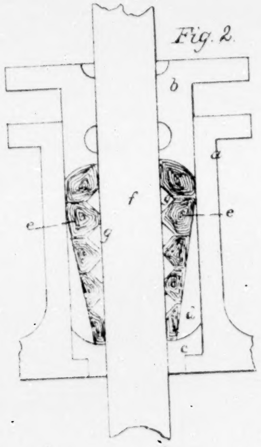


Fig. 4

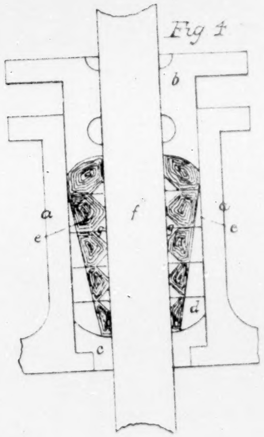


Fig. 6

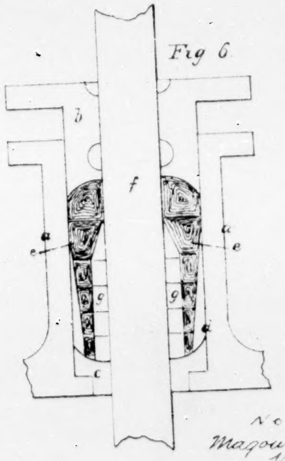


Fig. 8

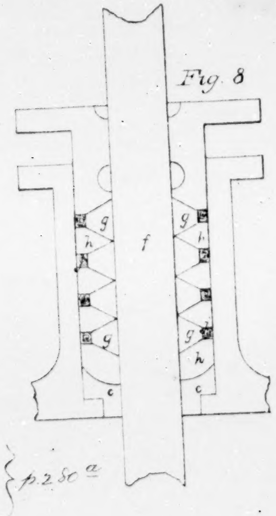
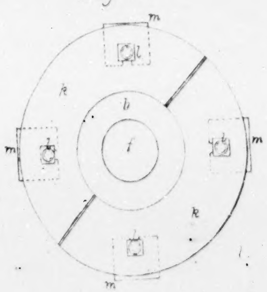


Fig. 10



No 305
Magowan et al.
v
N.Y. B. & P. Co.
} p. 280 a

SHEET 2

(3 SHEETS)

A.D. 1852. October 14. No 384.

TUCK'S SPECIFICATION.

No. 305.
Magowan et al.
N.Y. B. & P. Co.
} p. 280 b

Fig. 11.

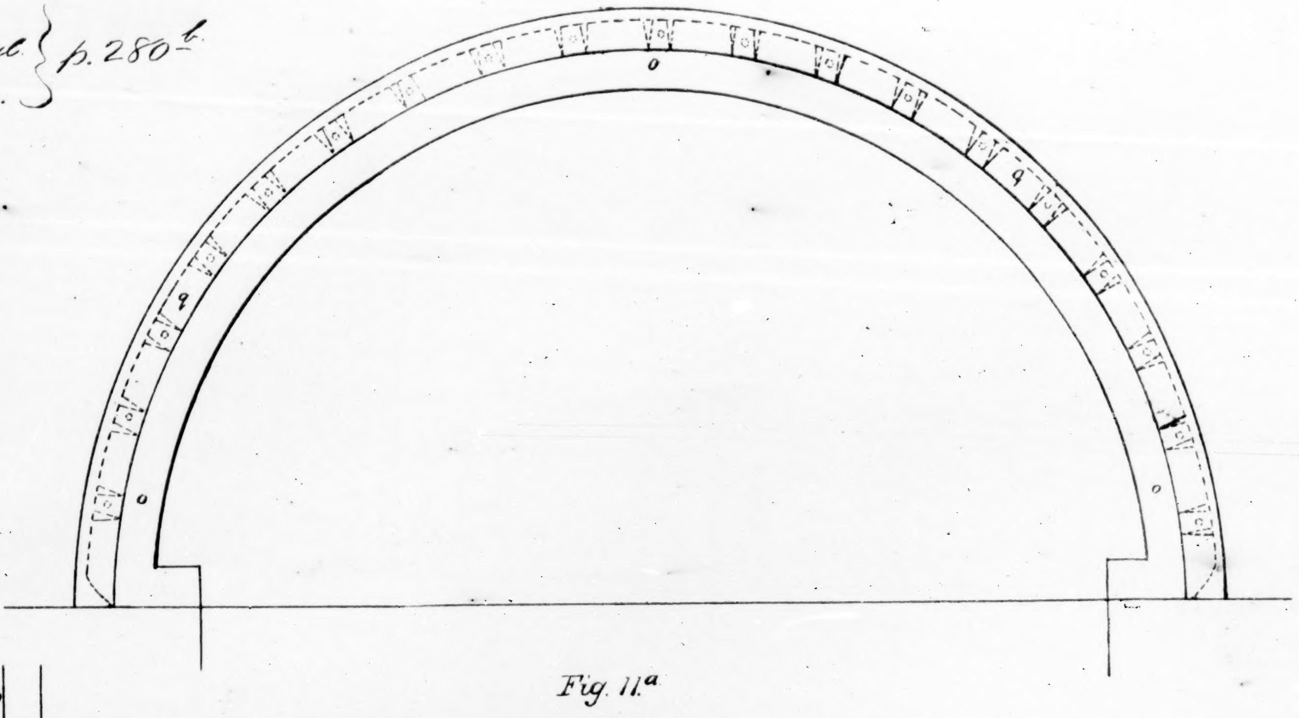


Fig. 12.

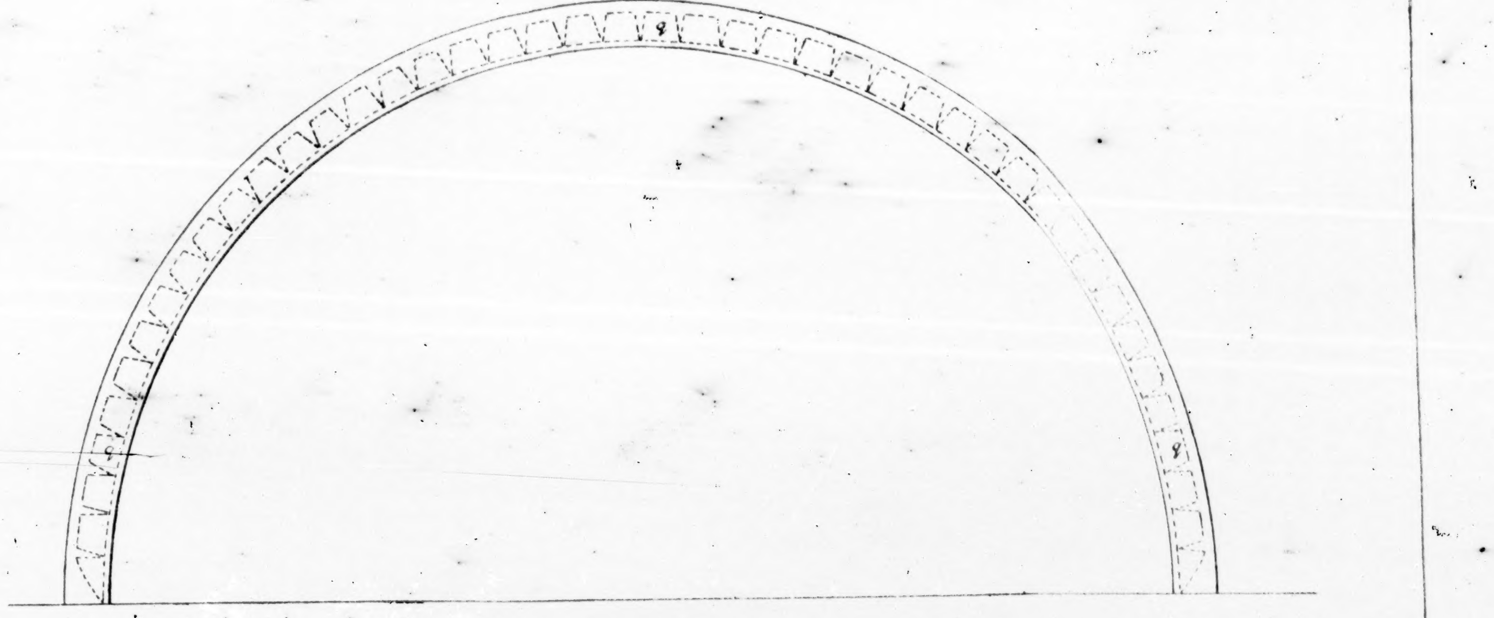


Fig. 11b

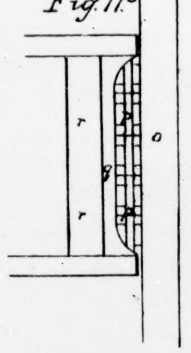


Fig. 11a

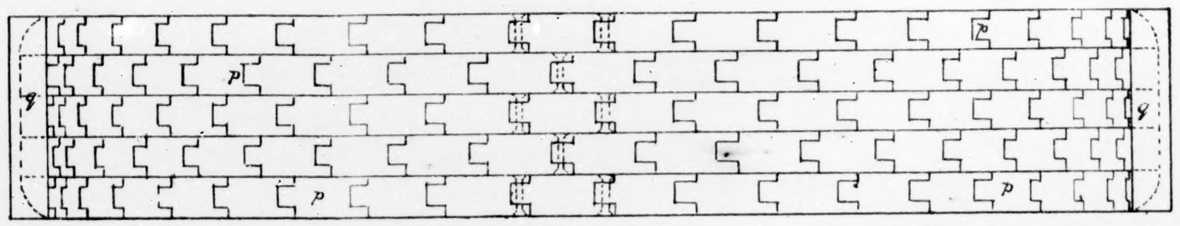


Fig. 12a

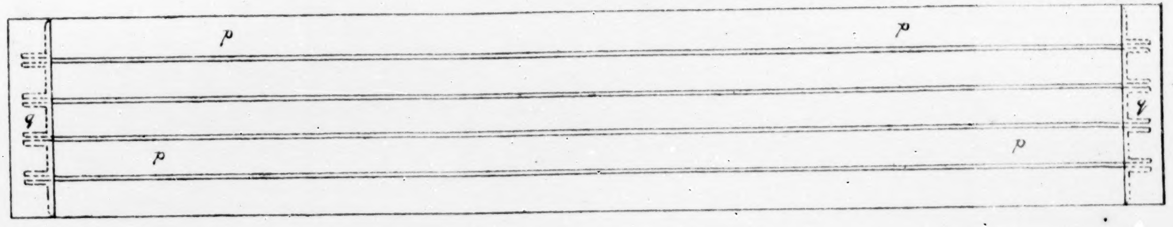


Fig. 12b

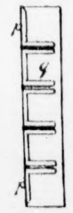


Fig. 13.

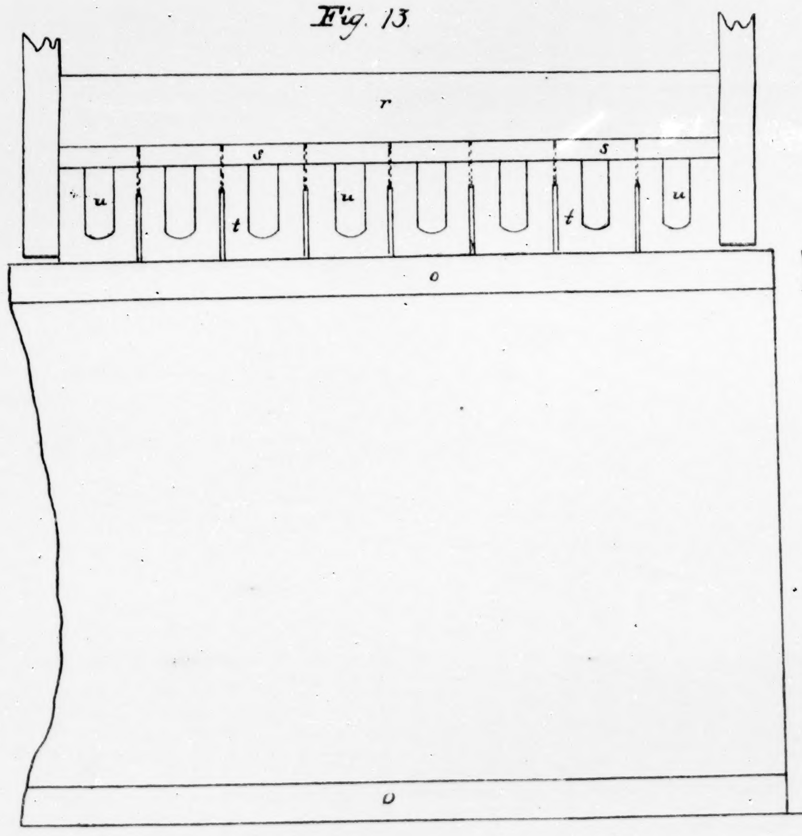


Fig. 13a

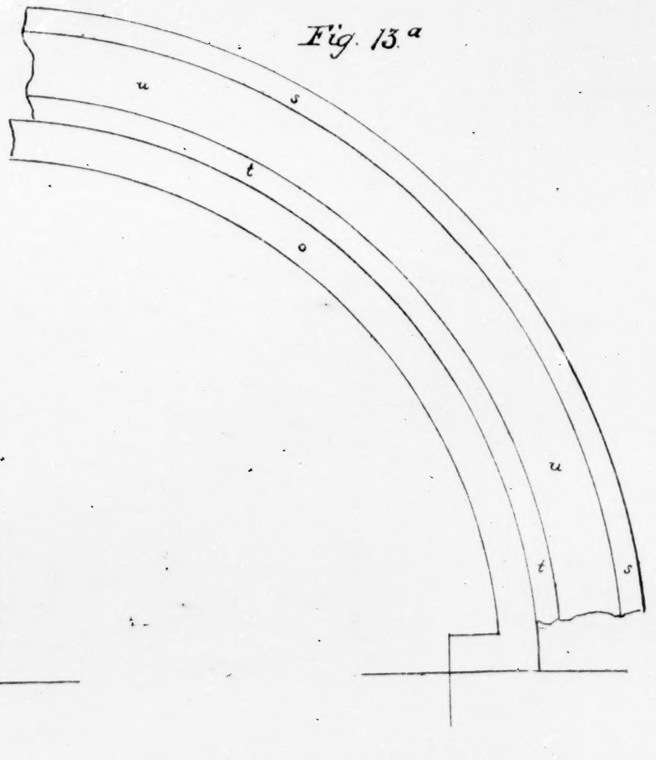
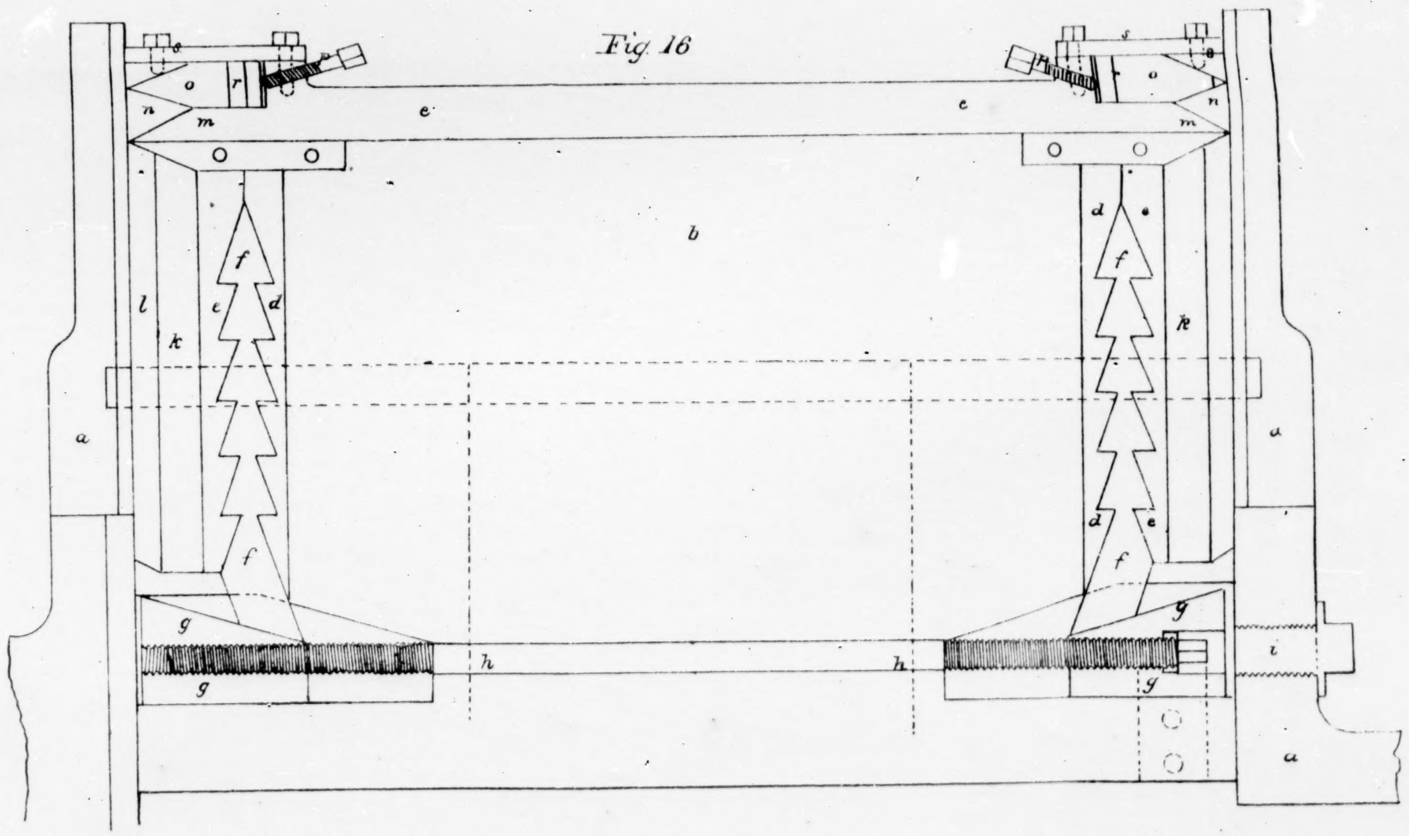


Fig. 16



A.D. 1852. OCTOBER 14. N° 384
TUCK'S SPECIFICATION.

SHEET 3.
(3 SHEETS)

No. 305.
Magowan et al. v. N.Y. B. & P. Co. } p. 280 c

Fig. 14.

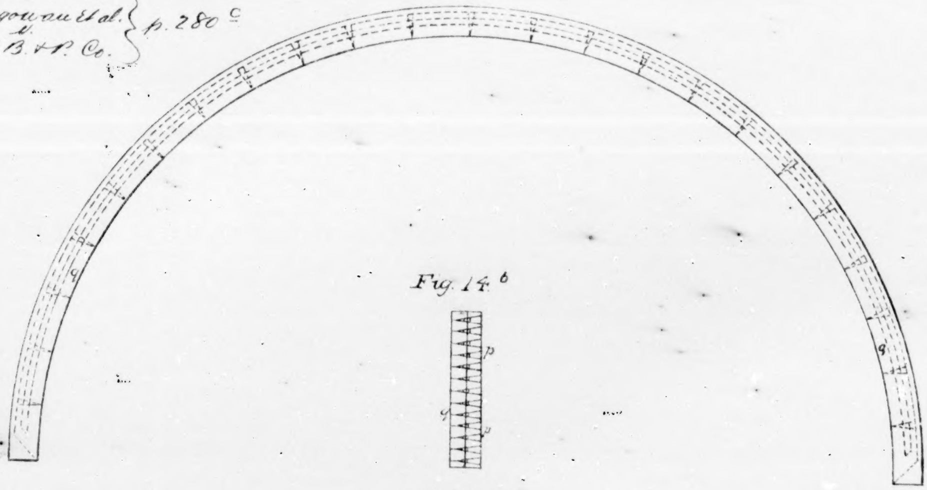


Fig. 14.^{b}

Fig. 14.^{a}

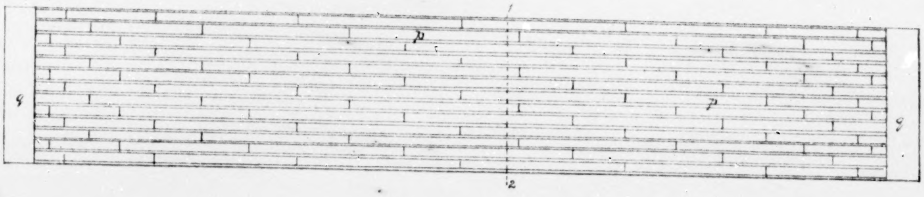


Fig. 15.

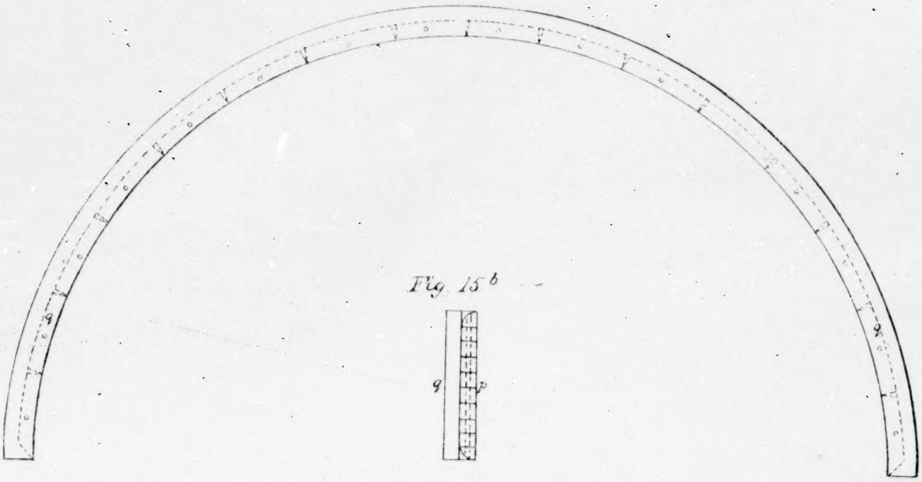
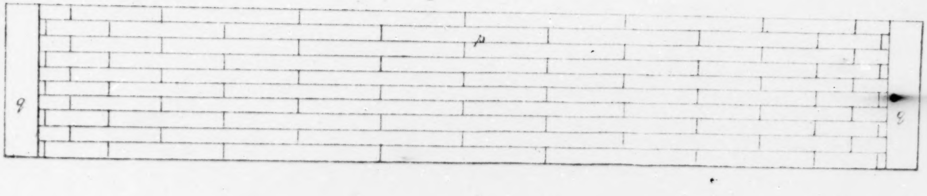


Fig. 15.^{b}

Fig. 15.^{a}

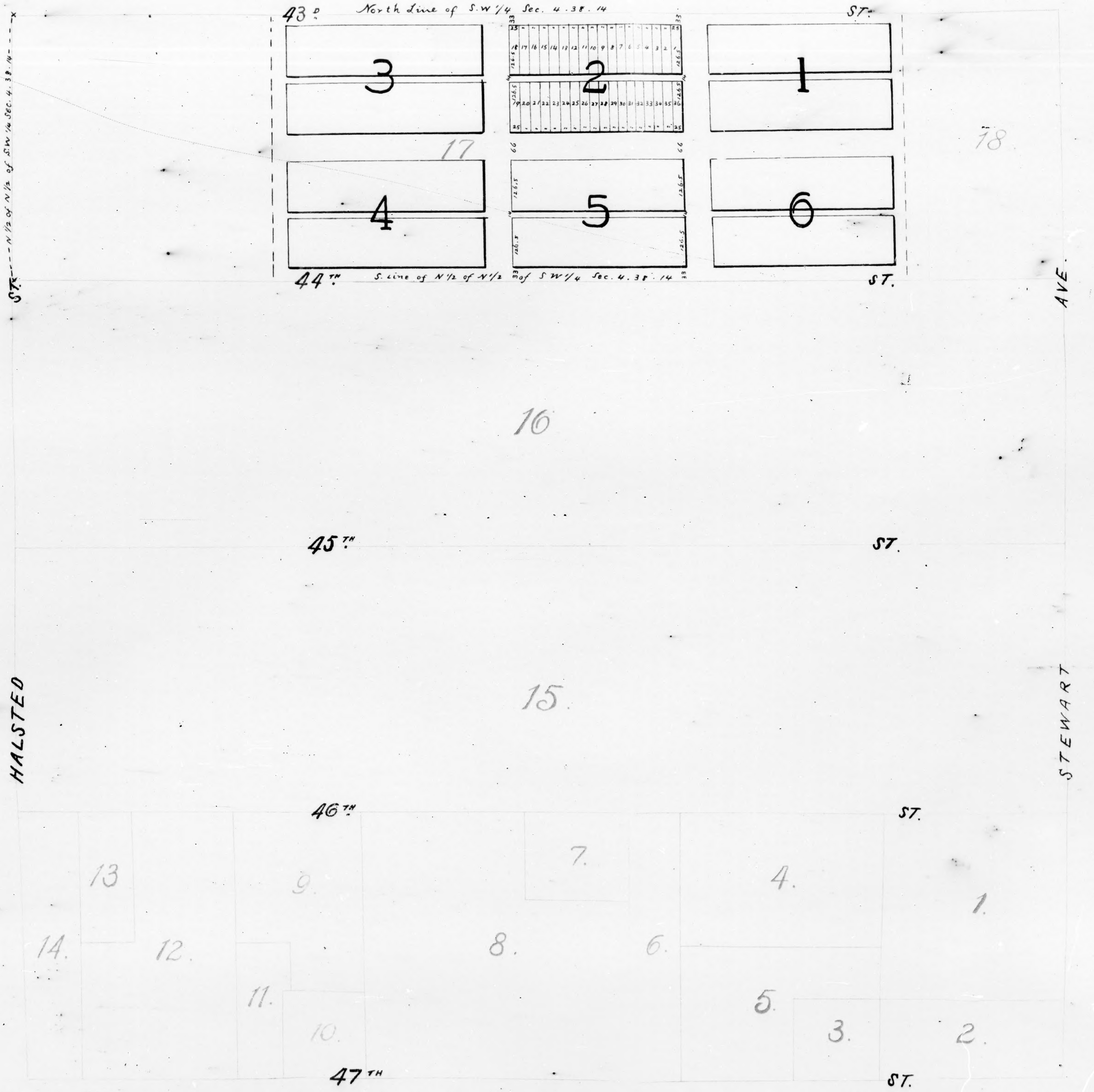


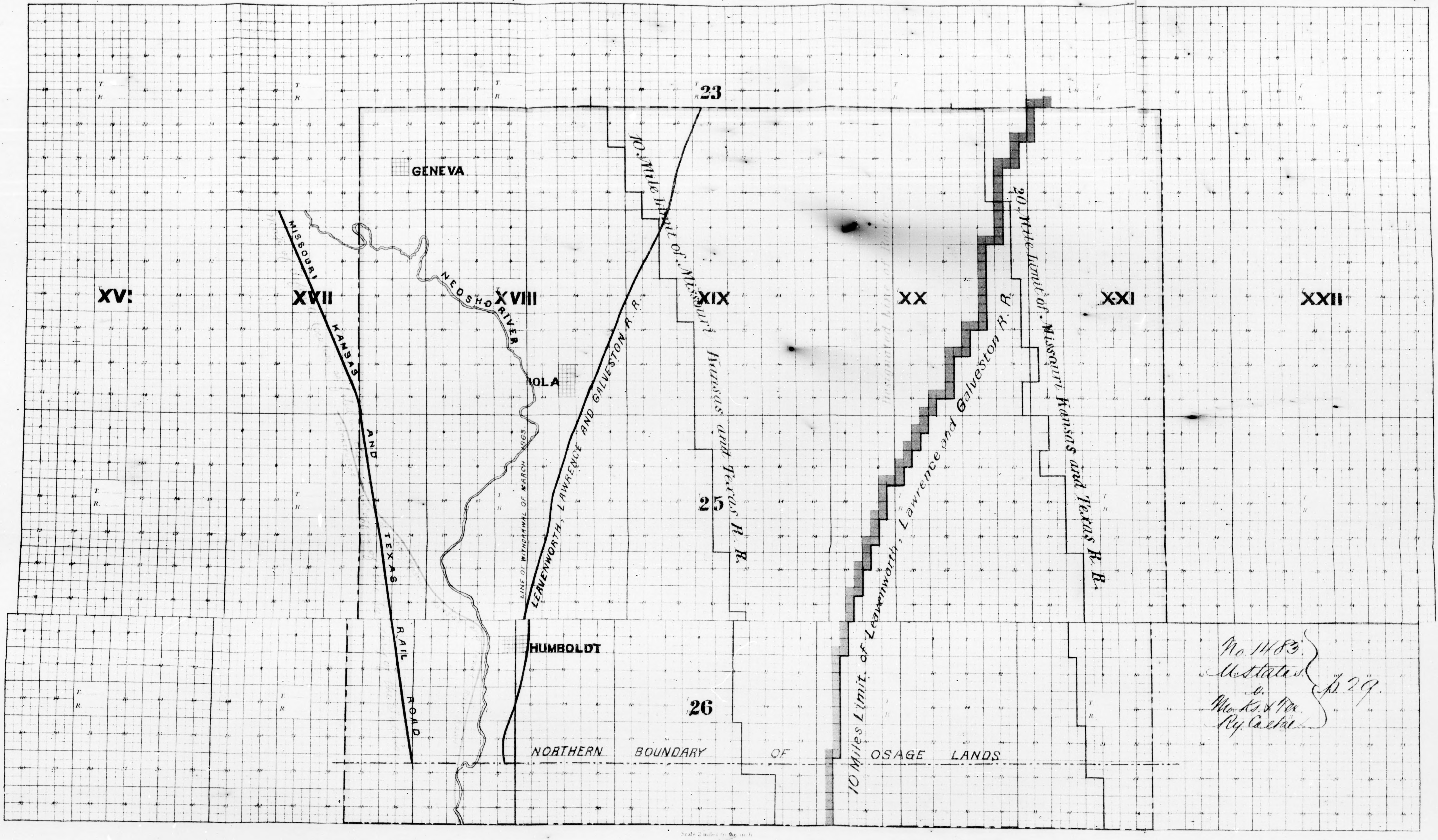
280c

Plat showing Assessor's Division of the
South West 1/4 of Section 4 Town 38 Range 14
in red Lines & figures. Recorded May 13. 1857 Book 133 P. 35

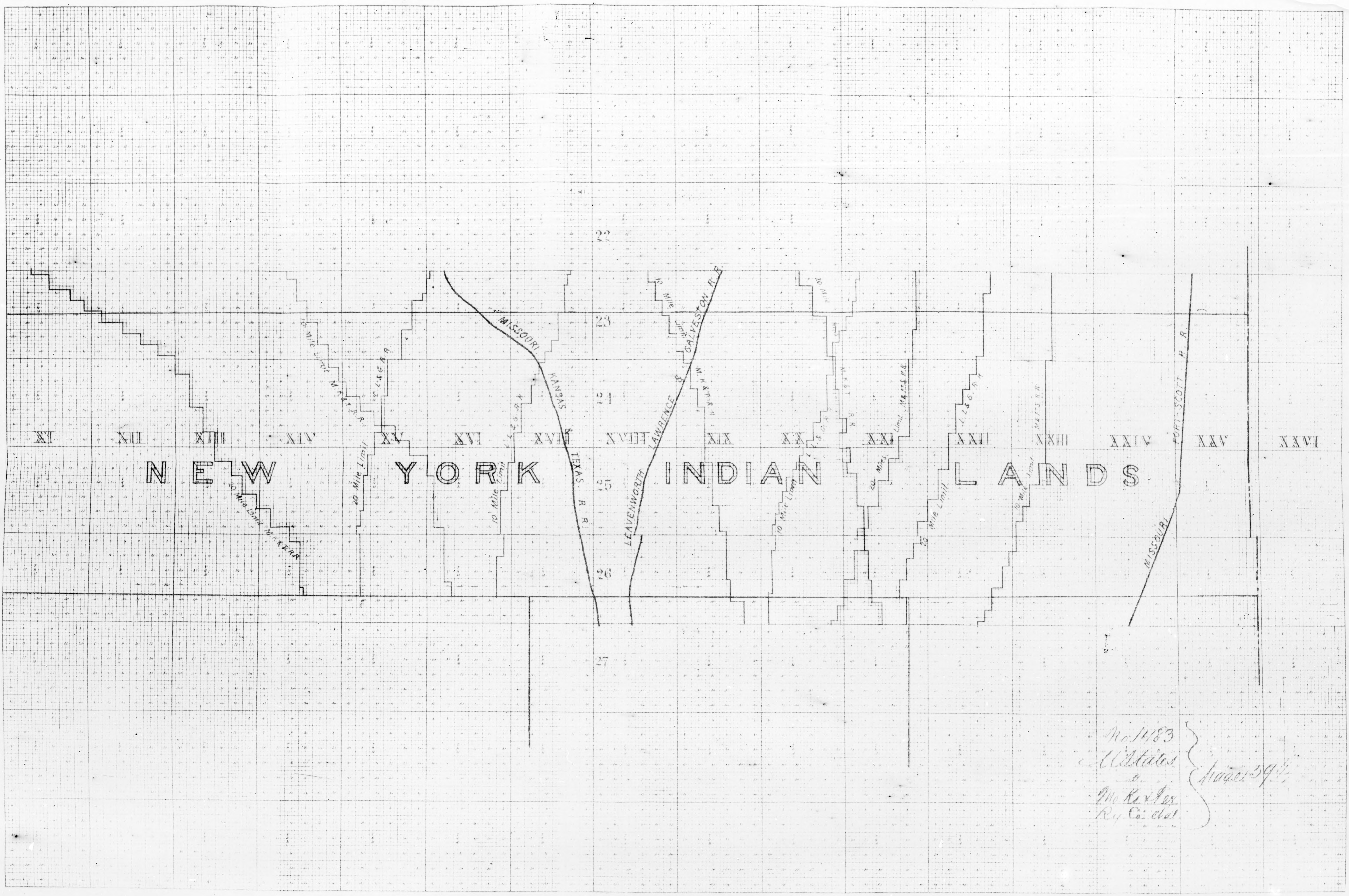
No. 172.
Gage
v.
Bani
p. 302.

Black lines & figures show: Louis Heintze's Subdn of 24 Acs.
East and adjoinig the West 10 Acs. of the N½ of the N½ of the
S.W¼ of Sec. 4. 38. 14. Recorded Feb. 22. 1866. Book 163 P. 106




23
GENEVA
10 Mile limit of Missouri Kansas and Texas R. R.
20 Mile Limit of Missouri Kansas and Texas R. R.
XV
XVII
XVIII
XIX
XX
XXI
XXII
MISSOURI KANSAS AND TEXAS RAIL ROAD
NEOSHO RIVER
IOLA
LINE OF WITHDRAWAL OF MARCH 1863.
LEAVENWORTH, LAWRENCE AND GALVESTON R. R.
10 Miles Limit of Leavenworth, Lawrence and Galveston R. R.
25
HUMBOLDT
26
NORTHERN BOUNDARY OF OSAGE LANDS
T
R
Scale 2 miles to the inch

No. 1483.
U. States
v.
Mo. Ks. & Tex.
Ry. Co. et al.
p. 29.



No. 1483
U. States
v.
Mo. Ks & Tex
Ry. Co. et al
} Pages 59½